

NAVAL POSTGRADUATE SCHOOL

Monterey, California



THESIS

**ANALYSIS OF CONTRACT DISPUTES RESOLVED BY
THE ARMED SERVICES BOARD OF CONTRACT
APPEALS (ASBCA) BETWEEN JANUARY 1998 AND
JUNE 1999**

by

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December 1999

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The primary purpose of this thesis is to analyze recent Armed Services Board of Contract Appeals (ASBCA) decisions relating to disputes in United States Government supply, services, and construction contracts in order to identify potential weaknesses in both Government and contractor organizations. In particular, the researcher is interested in Department of Defense (DoD) contracting norms and execution practices. This thesis identifies categories of contract disputes, as well as patterns of contract administration weaknesses, of both the Government and the contractor. The aim is to bring these dispute categories and contracting weaknesses to the attention of the acquisition professional in order to promote better administration of contracts in the future, with the potential effect of reducing the number of litigated contract disputes between the Government and commercial supply, services, and construction providers. Finally, this research effort offers recommendations to Contracting Officers and contracting activities to help provide for more effective and efficient contract execution and administration within the Government and, in particular, the Department of Defense.

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JANUARY 1998 AND JUNE 1999**

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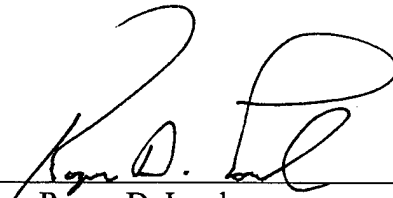
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ABSTRACT

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I. INTRODUCTION

A. GENERAL INFORMATION

Within the United States Government, the Department of Defense (DoD) is the largest user of the acquisition process. DoD initiated 57.9% of all reported procurement actions during FY 1997. [Ref. 1: p. 2] Also, DoD awarded a total of \$107 billion in prime contracts in FY 1997, or 7.6% of all Federal expenditures. [Ref. 2: p. 1] Because DoD generates such a large percentage of Government contracts each year, contract claims often arise, and when they do, it is the duty of both the Government and the supplier to mediate the dispute. Claims arise in a number of ways, and the Government answers them in a Contracting Officer's final decision (COFD). If the claim is denied, the dissatisfied party or parties may appeal the COFD and seek an Alternative Dispute Resolution (ADR). Occasionally, claims cannot be settled through ADR, or the parties decide to bypass ADR and elect to have their appeal litigated. Litigation is the last resort in resolving a claim. Litigation is costly and time-consuming, and disputes between the Government and the contractor over contract claims can be very disruptive to the business relationship. Claims or disputes are litigated in the form of as to either the Armed Services Board of Contract Appeals (ASBCA) or U. S. Court of Federal Claims. This thesis will analyze only ASBCA decisions.

B. PURPOSE

The objective of this thesis is to identify causes of disputes and potential weaknesses in acquisition contracting norms. The thesis will analyze and evaluate primarily DoD contract disputes resolved through litigation by the ASBCA between 1

January 1998 and 30 June 1999. The primary aim is to reveal problem areas in forming and administering of contracts which ultimately result in some form of claim and dispute against the Government. Another objective is to discover how these disputes arise and to gain insight into how future disputes can be avoided. The research will offer insight into both Government and contractor weaknesses that will lead to recommendations for improving contracting practices and for potentially reducing the number of claims in the future.

C. RESEARCH QUESTIONS

1. Primary Research Question

To what extent will an analysis of resolved ASBCA decisions provide insight into the nature of Government contract disputes and suggest ways to reduce such disputes in the future?

2. Secondary Research Questions:

There are six secondary research questions:

1. What is the current policy and process for handling contract disputes?
2. What will an analysis of DoD contract disputes resolved through litigation between January 1998 and June 1999 suggest about the nature of DoD contract disputes?
3. What will an analysis of the research results suggest about weaknesses in DoD contracting norms and execution practices?
4. What will an analysis of the research results suggest about weaknesses in contracting norms and execution practices?
5. What will further analysis of the research results suggest about ways to reduce DoD contract disputes?
6. What will further analysis of the research results suggest about ways to

reduce DoD contract disputes being decided against the Government?

D. SCOPE

The main thrust of this thesis is to analyze all 289 disputes resolved by the ASBCA during the 18-month period from January 1998 through June 1999. All facts for analysis came from the actual appeal decisions written by the ASBCA judges.

E. METHODOLOGY

The study and analysis were conducted using the following methods:

1. Review and analysis of each individual ASBCA appeal denied, sustained or dismissed during litigation between January 1998 and June 1999.
2. Telephone interviews with ASBCA judges and legal researchers.
3. LEXIS/NEXIS capabilities as required to draw down/print out each individual appeals case.

F. DEFINITIONS

Throughout this thesis, the following terms will be used. The definitions listed below provide the reader with additional background knowledge to better understand the summaries and analysis. In addition, Appendix A provides a listing of selected acronyms used throughout this thesis.

1. Administrative Contracting Officer (ACO): The ACO acts on behalf of the Procurement Contracting Officer (PCO) in either performing or monitoring assigned contract administrative functions, commencing after contract award and continuing through contract completion and close-out. [Ref. 3: p. 218]
2. Alternative Dispute Resolution (ADR): Any procedure or combination of procedures voluntarily used to resolve issues in controversy without the need to resort to litigation. These procedures may include, but are not limited to, assisted settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, and arbitration. [Ref. 4: p. 18-8]

3. **Claim:** A written demand or assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to a contract. [Ref. 5: Sec 52]
4. **Commercial Activity:** An activity that provides services obtainable from the private sector. Examples of commercial activities include custodial services, grounds maintenance, commercial off the shelf (COTS) material, and construction services. Commercial activities may be performed by military and/or Government civilian employees, or by contracts personnel. [Ref. 6]
5. **Contract:** A mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301. For discussion of various types of contracts, see Part 16. [Ref. 5]
6. **Contracting Officers Authority:** Contracting Officers are authorized, within any specific limitations of their warrants, to decide or resolve all claims arising under or relating to a contract subject to the Act. In accordance with agency policies and FAR Part 33, contracting officers are authorized to use ADR procedures to resolve claims. The authority to decide or resolve claims does not extend to:
 - a) A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine; or
 - b) The settlement, compromise, payment, or adjustment of any claim involving fraud. [Ref. 5]
7. **Contracting Officer's Technical Representative (COTR):** Assists the Contracting Officer in insuring that a contractor's performance proceeds in accordance with the terms of the contract. COTRs provide technical advice and guidance regarding specifications, purchase descriptions and statements of work. They have limited authority and are not authorized to give directions or instructions which exceed the authority appointed to them in writing by the Contracting Officer. [Ref. 3: p. 219]

8. Inherently Government Function: A function so intimately related to the public interest that it mandates performance by the Government. Examples of inherently governmental functions include command and control, intelligence operations, foreign relations, directing Federal employees, and accountable officers with discretionary authority to disburse funds. These types of functions are retained in-house by the Government and are not in competition with the private sector. [Ref. 5]
9. Neutral person: An impartial third party, who serves as mediator, fact finder, or arbitrator, or otherwise functions to assist the parties to resolve the issues in controversy. A neutral person may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties. A neutral person shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties, and all parties agree that the neutral person may serve [5 U.S.C. 583].
10. Procuring Contracting Officer (PCO): The Government agent designated by warrant or position, having the authority to obligate the Government, who directs and administers the procurement through acquisition planning, solicitation, selection, negotiation, award signing of contractual documents, contract administration and contract close-out. Administration of the contract after award may be delegated by the PCO to the Administrative Contracting Officer (ACO). [Ref. 7: p.7]

G. ORGANIZATION

Chapter I of this thesis presents the research questions used to guide the investigation into the reasons that supply, service, and construction contract disputes result in litigation. Additionally, this chapter discusses the scope and direction of the research and defines relevant terminology used throughout this study.

Chapter II describes the dispute process as a whole and its various components. This chapter also describes the most common Alternative Dispute Resolution (ADR) options and discusses in some detail the appeals process, from appeal initiation through decision issued by the ASBCA.

Chapter III provides a description of the ASBCA case population from which the data will be obtained. It outlines the collection plan used to gather the required data from cases analyzed in this thesis. Chapter III also presents various breakdowns of the researcher's data to aid in identifying trends in supply, service, and construction contract disputes. The chapter then breaks down the collected data elements into: 1) reasons for disputes, and 2) observed contract weaknesses of both the Government and the contractors.

Chapter IV presents an analysis of the data collected. The analysis will focus primarily on the most common dispute categories. In addition, the researcher will identify and analyze the most frequent weaknesses identified in both contractor and Government contracting practices.

Chapter V presents the conclusions and recommendations generated by this study, along with areas for further research on the topic of litigated supply, service, and construction contract appeals.

II. BACKGROUND

A. INTRODUCTION

This chapter provides an overview of the Federal Government's process for resolving contract disputes. By addressing key issues and elements, this chapter will introduce to the reader a basic understanding of the requirements for successfully navigating a claim through litigation after Alternative Dispute Resolution (ADR) has failed. The chapter also will include a brief introduction to ADR options currently used by the Government; this will provide an overview of the entire range of choices afforded the claimant. Finally, the chapter presents the current appeals procedures that are required by the Armed Services Board of Contract Appeals (ASBCA).

B. THE DISPUTE PROCESS

Disputes between a contractor and the Government are resolved under procedures prescribed by the Contracts Dispute Act of 1978 (CDA), 41 U.S.C. 601, which codified and broadened existing disputes procedures. [Ref. 8: p. 1239]

Under the CDA, the contractor is given the right to appeal a Contracting Officer's final decision (COFD) to either an agency board of contract appeals (BCA) or the Court of Federal Claims (Court). The disputes process is the last resort when the parties cannot settle their disagreements through some form of mediation or negotiation. A claim involves a number of steps, from the initial appeal of the Contracting Officer's final decision to the possible (but very rare) review and decision by the U.S. Supreme Court. During this appeals process, the parties are not obligated to continue and may elect, at any time, to resolve their disagreements through some form of negotiation. [Ref. 8: p. 1240]

1. Contracting Officer's Final Decision

If the Contracting Officer (CO) and the contractor are unable to settle a contractor's claim, then the CDA requires the Contracting Officer to render a decision, called the Contracting Officer's final decision (COFD.) The COFD represents the final rejection of the claim by "the Government" and becomes the first step in the litigation process. An agency's Board of Contract Appeals (BCA) does not have jurisdiction until a valid COFD is on file, and a timely appeal has been submitted to the Board or Court. The Federal Acquisition Regulation (FAR) contains detailed guidance regarding the Contracting Officer's duties in deciding a claim. These duties include: 1) reviewing all pertinent facts; 2) securing assistance from his or her legal counsel and other advisors; 3) coordinating with other Government offices to the extent necessary; and 4) preparing a written decision. [Ref. 9: p. 19-8]

The content of the COFD should include: 1) a description of the claim or dispute; 2) reference to pertinent contract provisions; 3) a statement of the factual areas of agreement or disagreement; 4) the Contracting Officers supporting rationale; and 5) a demand for payment when the decision finds that the contractor is indebted to the Government. In addition, the Contracting Officer must include a paragraph containing language notifying the contractor of his or her rights to appeal, as follows:

This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. With regard to appeals to the agency

board of contract appeals, you may, solely at your election, proceed under the board's small claims procedure for claims of [\$50,000] or less or it's accelerated procedure for claims or [\$100,000] or less. Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims within 12 months of the date you receive this decision. [Ref. 9: p. 19-9]

In addition, the Contracting Officer's decision will not become "final" if the parties continue to engage in negotiations, or there is a reasonable likelihood that the Contracting Officer is reconsidering his decision. [Ref. 9: p. 19-10]

2. Claim Asserted

The contractor's submission of a "written" claim initiates the disputes process. The receipt of this claim triggers the Contracting Officer's obligation to make a timely decision of the claim and begins the timer in calculating interest on the claim amount. Early notice to the Contracting Officer of the probability of a claim by the contractor is considered good business practice, in that it alerts the Contracting Officer to a contract problem. Taking early remedial steps improves the odds of quickly settling a dispute, as opposed to a long, expensive litigation. [Ref. 9: p. 19-4]

The CDA contains no official definition of a "claim." However, a claim must meet two basic requirements: 1) all claims by a contractor "shall be in writing and submitted to the Contracting Officer for a decision"; and 2) all contractor claims over \$100,000 must be certified. The CDA provides as follows:

For claims of more than \$100,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his or her knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the contractor

believes the government is liable, and that the certifier is duly authorized to certify the claim on behalf of the contractor. [Ref. 9: p. 19-4]

The disputes contract clause, however, defines a claim as “a written demand or written matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or related to a contract.” [Ref. 9: p. 19-4]

3. Agency Boards of Contract Appeals (BCA)

The Boards of Contract Appeals serve as the administrative forums for deciding the merits of claims that the parties have been unable to resolve at the Contracting Officer level. The CDA has broadened the Boards' authority, specifically giving each agency Board jurisdiction “to decide any appeal from a decision of a Contracting Officer . . . relative to a contract made by that agency.” In exercising this jurisdiction, an agency Board is authorized to grant any relief that would be available to a litigant submitting a contract claim before the United States Court of Federal Claims. The Boards are able to: 1) modify, reform, or rescind contracts in the case of bid mistakes; and 2) decide the merits of cases involving breach of contract theories. In all, there are 11 BCAs: [Ref. 8: p. 1312]

<u>Board</u>	<u>Number of Members</u>
Armed Services Board of Contract Appeals (ASBCA)	38
Department of Energy Board of Contract Appeals (EBCA)	3
Department of Agriculture Board of Contract Appeals (AGBCA)	5

Department of the Interior Board of Contract Appeals (IBCA)	6
Department of Transportation Board of Contract Appeals (DOTBCA)	4
General Services Administration Board of Contract Appeals (GSBCA)	12
Postal Service Board of Contract Appeals (PSBCA)	5
Department of Veterans Affairs Board of Contract Appeals (VABCA)	6
Department of Labor Board of Contract Appeals (LBCA)	5
Department of Housing and Urban Development Board of Contract Appeals (HUDBCA)	3
Corps of Engineers Board of Contract Appeals (ENGBCA)	7

4. U.S. Court of Federal Claims

Within the CDA, the contractor has the option of appealing an adverse COFD to the Board or filing an appeal directly in the Court of Federal Claims (Court). The Federal Courts Administration Act of 1992 expanded the jurisdiction of the Court of Federal Claims to include non-monetary Government contracting disputes. The Court and the Boards jurisdiction are virtually identical. The pretrial, trial, and decision procedures used by the two forums differ, however, in that the Court's procedures are generally more formal than the Board's procedures. [Ref. 9: p. 18-8]

5. Higher Courts

In cases where either the Government or the contractor requires further appeal to a higher court, the Court of Appeals for the Federal Circuit may be pursued after receipt of

an adverse decision from either a Board or the Court of Federal Claims. The contractor or the Government has 60 days from the date of receipt of the decision to file an appeal of a Court of Federal Claims decision and 120 days to file an appeal of a Board decision. The Supreme Court reviews Government contract cases decided by the Federal Circuit only when they, at least potentially, would have far-reaching precedential effect and have the approval of the Attorney General. [Ref. 9: p. 18-9]

C. CONTRACT DISPUTES ACT (CDA)

For years, resolution of Government contract disputes were resolved by various statutes and contract clauses limiting the types of legal or equitable relief contractors could obtain from the Government and the procedures for obtaining that relief. In 1978, Congress restructured the disputes process in the CDA, setting forth a standard procedure for by all executive agencies. Among other things, the CDA: (1) increased the authority of the Contracting Officer to settle disagreements and the agency BCAs to determine the merits of disputes; (2) broadened the types of claims that are subject to the disputes process and made Government claims against contractors subject to the process; (3) set time limitations on issuing Contracting Officer decisions on contractor claims; (4) created accelerated and expedited schedules for the resolution of small claims; (5) provided contractors with a choice of forum for challenging an adverse Contracting Officer decision (appeal to the appropriate agency BCA or file the appeal in the Court of Federal Claims); and (6) gave both the Government and contractors the right to appeal adverse Board or

Court decisions. All of these procedures were designed to avoid what Supreme Court Justice Douglas referred to as "vexatious and expensive and, to the contractor, ruinous litigation." [Ref. 9: p. 18-2]

Earlier in this century, prior to adopting the contracts disputes procedures, contractors could assert claims against the Government under the Tucker Act, 28 U.S.C. 1346 (a) and 1491, waiver sovereign immunity for "any claim against the United States." With Government procurements becoming a significant factor, primarily in the latter half of the twentieth century, contractor rights became significantly limited by the incorporation of disputes provisions into contracts with the Government. Contractors were required to exhaust all administrative remedies—the Contracting Officer's decision, followed by an appeal to the head of the agency or Board—before bringing suit. [Ref. 8: p. 1239]

1. Decision to Appeal or Bring Suit

In accordance with the CDA, only the contractor has the right to challenge the Contracting Officer's final decision. The Government does not retain any rights to challenge a Contracting Officer's final decision; rather, it must wait and appeal the Board's or Court's final decision. [Ref. 8: p. 1299]

2. Choice of Forums

The contractor has a choice of forums in which to officially challenge the Contracting Officer's (Government) position on a case matter. Under the CDA, contractors may either appeal the Contracting Officer's decision to a Board of Contract Appeals or bypass the Boards and bring a suit against the Government directly in the

Court of Federal Claims. (The contractor chooses a forum by filing a complaint, within one year, in the Court of Federal Claims). [Ref. 8: p. 1299]

A contractor who files a claim will receive a reasonably expeditious, objective, and fair decision, regardless of the forum in which he or she chooses to litigate the claim. As mentioned previously, both forums have essentially the same jurisdiction, discovery procedures, and remedies, and may hold hearings at locations that are convenient to the parties. However, a number of factors should be considered in deciding which forum to select. [Ref. 8: p.1299] Because litigation before a Board of Contract Appeals is somewhat less formal than litigation in the Court, resolution of the dispute by a Board will probably be less expensive, speedier, and more flexible in the conduct of the proceedings. In addition, pursuant to the CDA, the Board has procedures for the accelerated and expedited processing of small claims. A contractor may wish to consider the presence or absence of precedent in the chosen forum on issues similar to those in the contractor's appeal. A contractor may also appeal different claims under a single contract to different forums. [Ref. 9: p. 19-2]

3. Alternative Dispute Resolution Options

Another procedure for resolving claims and disputes in lieu of litigation is Alternative Dispute Resolution (ADR). ADR includes any procedure or combination of procedures voluntarily used to resolve issues in controversy. These techniques are now recognized and encouraged by the Administrative Dispute Resolution Act, 5 U.S.C. 571-584, as implemented by FAR Part 33. [Ref. 10: p. 804] The following are general descriptions of the most common forms of ADR. The methods are listed in ascending

order according to their formality and level of involvement by higher levels of the Government and contractor parties:

1. Negotiation. A process by which disputants communicate their differences to one another through conference, discussion and compromise in an attempt to resolve these differences. [Ref. 4]
2. Mediation. A step beyond direct negotiation. Mediation involves a neutral third party who normally takes a passive role by helping the parties evaluate and compare their respective decisions so that they can move forward toward a settlement. Mediation is generally non-binding, less costly, and encourages settlement at a much earlier stage than other dispute resolution techniques. [Ref. 11: p. 5] [Ref. 12]
3. Conciliation. The use of a neutral third party in the role of evaluator. The evaluator will hear all presentations made by both parties and then form a recommendation as to what the case is worth and how it should be settled. The evaluator may sometimes pressure the parties to settle according to his or her conclusion, although the recommendation is non-binding. [Ref. 11: p. 6]
4. Fact-Finding. An investigation of a dispute by an impartial third person who examines the issues and facts and then may issue a non-binding report and recommend settlement. [Ref. 4] Often, the investigator will be an expert on the subject matter. [Ref. 11: p. 6]
5. Ombudsman. One who investigates reported complaints, reports findings and helps to achieve an equitable settlement. This process has been adopted by private institutions to reduce litigation and resolve other matters, including employment disputes. [Ref. 4]
6. Mini-Trial. A structured settlement process in which senior executives of the companies involved meet in the presence of an impartial person who, after hearing truncated presentations from each side of the dispute, attempts to formulate a voluntary settlement. [Ref. 13] [Ref. 14]
7. Mediation/Arbitration (Med/Arb). A process that employs a neutral party selected to serve as both mediator and arbitrator in a dispute. Med/Arb combines the voluntary techniques of persuasion and discussion, as in mediation, with an arbitrator's authority to issue a final and binding decision. [Ref. 4]
8. Arbitration. The most formal ADR method. It may be binding or non-binding. Arbitration is a process whereby the parties agree to have a dispute resolved by appointing a person—an arbitrator (or arbitrators)—who

will listen to the presentations of the case and the evidence and then render a decision. Arbitration can become extremely costly. Non-binding arbitration is a settlement technique intended to help the parties evaluate their cases realistically. Binding arbitration is enforceable in court and is generally the most adversarial and costly. The arbitrator assumes the role of judge. [Ref. 11: p. 6]

D. ARMED SERVICES BOARD OF CONTRACT APPEALS PROCEDURES

This section reviews the procedures of an administrative appeal. The procedures of the ASBCA, the largest and most active of the agency boards of appeal, are used as a model. Procedures of the ASBCA are found in the Rules of Practice. [Ref. 9] They reflect the rules used by other agency boards of appeal.

1. Initial Steps

A Notice of Appeal filed by the dissatisfied party initiates an appeal to a Board of Contract Appeals following a Contracting Officer's final decision. Under the ASBCA's procedures, this notice is filed directly with the Board, and a copy is forwarded to the Contracting Officer. Under the Contracts Disputes Act (CDA), this notice must be filed not later than 90 days after the contractor receives the Contracting Officer's final decision. [Ref. 9: p. 20-2]

The Notice of Appeal need not be a formal legal document. It must simply state, at a minimum: "We hereby appeal the Contracting Officer's decision dated ____ with regard to contract number ____." However, the Notice of Appeal must make clear whether the contractor intends to appeal to a Board or to sue in the Court of Federal Claims. Again, the Boards will dismiss any and all claims, regardless of merit, not submitted within 90 days following Contracting Officer's final decision. [Ref. 9 p. 20-2]

Once the Board receives the appeal notice, it is "docketed." This simply means that it is assigned a number, and a notice to that effect is sent to both parties. Under ASBCA procedures, the docketing notice sent to the appellant includes a copy of the ASBCA rules and information about ADR procedures. [Ref. 9: p. 20-3]

The majority of the appellants appearing before BCAs are represented by attorneys. ASBCA expressly permits representation without an attorney present; however, the majority of all appellants do choose legal representation. [Ref. 9: p. 20-3]

The appellant must file a complaint or pleading within 30 days after receiving notice that the appeal has been docketed. Complaint formats vary dramatically; however, a well-prepared complaint should state (1) the key facts surrounding the claim and (2) the underlying legal theories that support the claim. The ASBCA allows the Notice of Appeal to also serve as the complaint. [Ref. 9: p. 20-4]

Under ASBCA rules, the Government must respond to the appellant's allegations within 30 days of receipt of the complaint. The answer must consist of "simple, concise and direct statements" of the Government's defenses to each claim the appellant asserts. The Government's answer to the Board most frequently responds to the allegations in the order presented and either admits or denies each allegation. The Government's answer also informs the Board of the defenses on which the Government is relying. The Government also is allowed to present any relevant affirmative defenses. [Ref. 9: p. 20-4]

Rule 4 of the ASBCA rules requires the Contracting Officer, within 30 days of receiving docketing notice, to assemble and transmit to the Board an appeal file including all documents pertinent to the appeal. These documents include: (1) the Contracting Officer's final decision; (2) the contract and all pertinent specifications, amendments,

plans, and drawings; (3) all relevant correspondence; (4) any relevant transcripts, affidavits, or statements; and (5) any additional information considered relevant to the appeal. The Contracting Officer must arrange these Rule 4 documents chronologically, and must number, tab, and index them. [Ref. 9: pp. 20-1/5]

2. Discovery

As a general rule, discovery can be defined as a pretrial procedure designed to promote full disclosure of all facts relevant to a case. As recognized in the ASBCA rules, there are four major methods of discovery available to the parties in Board proceedings: (1) taking depositions—either through oral examination or written questions; (2) submitting written interrogatories (questions) to the other party; (3) requesting the other party to produce documents; and (4) asking the other party to admit or deny the truth of relevant facts (called “requests for admissions”). The discovery procedures may commence after the appeal has been docketed and the complaint filed. [Ref. 9: p. 20-6]

If properly used, discovery enables both parties to be fully informed about the material facts surrounding the appeal. It should eliminate, to a large extent, the “surprise” aspect that formerly characterized some proceedings. This does not mean, however, that every aspect of the other side’s case is discoverable, as some information may be privileged from disclosure. Although many privileges exist in the law, in the Government contracting context, two have particular importance: (1) the attorney-client privilege, which prevents certain communications with an attorney from being disclosed during discovery proceedings or at trial; and (2) the executive privilege, which protects confidential advisory opinions and recommendations whose disclosure would be injurious to the Government. [Ref. 9: p. 20-7]

3. Subpoenas

Related to discovery is the Board's right to issue subpoenas. Subpoenas may require a witness to testify at a deposition or a hearing, or to produce books, files, and records, as designated in the subpoena, at the deposition or hearing. Under ASBCA rules, the Board is authorized to issue a subpoena on written request from either party or on the Board's own initiative.

In order to be granted a subpoena, a party must show reasonable scope and general relevance to the appeal. A Board may refuse to issue a subpoena if the requesting party has not used reasonable pre-hearing discovery procedures to limit the information being requested to relevant material. Subpoenas are used only as a last resort, when voluntary cooperation is not forthcoming. [Ref. 9: p. 20-8]

4. Motions

Motions have become increasingly important in Board proceedings. The full range of motions filed in Court proceedings are now common Board practice. Particularly important is the motion for Summary Judgment, which, if granted, results in disposition of the appeal without a hearing. The Boards apply the same criteria in deciding motions for Summary Judgment as do the Courts—that is, whether there are material facts at issue and, if not, whether the moving party is entitled to judgment as a matter of law. [Ref. 9: p. 20-8]

5. Abbreviated Proceedings

Appeals are decided after both parties have the opportunity to present their evidence and arguments at a hearing. There are alternative methods for processing appeals which require less time and less expense:

1. **Submission Without Hearing.** Either party may elect to waive a hearing and submit its case on the record before the board. This simplified procedure is normally chosen in cases involving relatively small and uncomplicated claims where the dollar amount disputed would likely be exceeded by the time and expense of preparing for, and appearing at, a hearing. [Ref. 9: p. 20-10]
2. **Small Claims Procedures.** Under the CDA, contractors may—if their claims fall within certain prescribed amounts—elect to have decisions issued by a Board within either four or six months after such elections are made. Decisions within four months occur under the “expedited procedure.” Decisions within six months take place under the “accelerated procedure.” [Ref. 9: p. 20-10]
3. **Expedited Appeals (Rule 12.3 Proceedings).** A contractor with a claim of \$50,000 or less may elect to use the expedited procedure. Under this procedure, the Board must decide the case within 120 days of the appellant’s election. Written decisions in expedited appeals are rendered by a single administrative judge. Decisions in expedited appeals are not published, are of no precedential value, and may not (in the absence of fraud) be appealed. [Ref. 15]
4. **Accelerated Appeals (Rule 12.2 Proceedings).** If the amount of the claim is less than \$100,000, an appellant may elect to have a decision rendered by the Board within 180 days after the election is made. Accelerated proceedings follow a pattern similar to that of expedited proceedings. The parties will be encouraged to the extent possible—consistent with adequate presentation of their factual and legal positions—to waive pleadings, discovery, and briefs. Written decisions in accelerated proceedings are rendered by the presiding judge with the concurrence of a vice-chairman of the Board. Such decisions are published, may be appealed in the normal manner, and are valid precedent. [Ref. 15]

The most obvious advantage to the expedited and accelerated procedures is that they ensure the contractor a speedy decision in small claims appeals. However, with the compressed time schedule, neither party has the opportunity to conduct discovery with regard to the other party’s case. Also, if the appeal is from a termination for default, electing the accelerated or expedited procedure may limit a later claim for termination for convenience costs up to \$50,000 (expedited procedure) or up to \$100,000 (accelerated

procedure). For these reasons, most appeals continue to be processed in accordance with the Board's normal procedures. [Ref. 9: p. 20-11]

6. Hearings

If the parties have not chosen to have the appeal decided on the written record, and the appellant has not elected either of the small claims procedures, a hearing will be scheduled and conducted in accordance with normal procedures of the Board. These procedures, as illustrated in the ASBCA's rules, are discussed below: [Ref. 9: p. 20-11]

1. **Prehearing Conference.** The Board may arrange for a pre-hearing conference. Prehearing conferences can serve to: (a) make parties aware of the Board's rules and procedures; (b) ensure that the pretrial discovery process is conducted in a timely fashion; (c) resolve problems or disagreements between counsel; and (d) facilitate efficient scheduling of pretrial procedures and the trial itself.
2. **Hearing Location and Date.** Hearings will be held at such places determined by the Board to best serve the interest of the parties and the Board. Although the ASBCA and the other Boards are all located in and around Washington, D.C., hearings may be conducted in other locations. Nearly 75% of all ASBCA trials are held outside the Washington, D.C. area.
3. **Hearing.** The typical board hearing, although somewhat informal, is conducted before a single ASBCA judge in a manner similar to a federal civil trial held without a jury. The evidence presented by the parties must, subject to the presiding judge's discretion, be admissible under the Federal Rules of Evidence. Both parties initially present brief opening statements, and the appellant, who usually bears the "burden of proof," presents its witnesses. Each witness is subject to cross-examination by Government counsel and may also be questioned by the judge. Once the appellant has concluded his or her presentation, the Government witnesses testify under the same conditions. At the conclusion of both parties' testimony, each party presents whatever rebuttal evidence it deems appropriate. Hearings can last a few hours or several months.
4. **Post-hearing Briefs.** A verbatim transcript of the hearing is distributed to the parties. Normally, at the hearing conclusion, the parties and the judge will agree on a suitable schedule (e.g., 45 days from receipt of transcript) for submission of briefs. Once the judge has received the transcript and briefs, he or she can begin the process of deciding the appeal.

7. Decision

The judge will, upon reaching a decision on the appeal, review (1) the Rule 4 appeal file, (2) any additional documentary evidence introduced at trial, (3) the transcript of the hearing, and (4) the post-hearing briefs. After this review and a consideration of the proper legal precedents, the judge prepares a draft opinion, which is then circulated to one of the ASBCA's three vice-chairmen and the Board's chairman. As opposed to abbreviated proceedings, where only one or two judges participate, three judges take part in deciding a standard ASBCA appeal. In fact, if one of the three judges dissents from the majority's conclusion, two additional judges will participate. In the "standard" appeal, a majority vote determines the winning party. Once the presiding judge's opinion has been prepared in final form and signed by the participating judges, it is distributed to the parties, made available to the public, and published. All Board decisions, except those issued under Rule 12.3 Expedited procedures, are commercially published. [Ref. 9: p. 20-12]

a. Reconsiderations

Either party may, within 30 days of receiving the Board's decision, file a motion for reconsideration of either the entire decision or certain portions of it. Reconsideration motions should point out some significant fact or facts that the Board overlooked or misinterpreted, or indicate some newly discovered evidence that was not available during the original hearing. Motions for reconsideration are overwhelmingly denied, unless they can point objectively to some factual or mathematical error in the Board's decision. As a result, experienced attorneys generally bypass such motions and seek judicial review of the Board's decisions. [Ref. 9: p. 20-15]

b. Judicial Review

The Court of Appeals for the Federal Circuit has exclusive jurisdiction to review contractor or Government appeals from BCA decisions. The procedures and standards of the Court of Appeals for the Federal Circuit are beyond the scope of this thesis.

c. Summary Judgment

Either party can submit a motion or move for summary judgment which allows the judge to render a decision based on the material facts without a hearing. Summary judgment is properly granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law, *Mingus Constructors, Inc. v. United States*, [33 CCF P75,126] 812 F.2d. 1387,1390-92 (Fed. Cir. 1987). When a move for summary judgment is denied by the Board, the case becomes pending while awaiting a full hearing by the Board.

E. SUMMARY

This chapter presented an overview of the Federal Government's process for liquidating disputes. The chapter described the various Courts and Boards used in the appeals process, as well as the various forms of ADR currently in use. Finally, this chapter described, in some detail, the steps required by the ASBCA to successfully navigate a claim through the appeals process, from the initial steps to final decision.

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III. DATA PRESENTATION

A. INTRODUCTION

This chapter presents the results of the data gathered from litigated cases decided by the Armed Services Board of Contract Appeals (ASBCA). The chapter first describes the population and the researcher's data collection plan. It then presents historical data drawn from the ASBCA FY98 annual report, shown in Appendix E, for purposes of later comparison. Finally, the chapter presents the researcher's data, which is broken down into formats that invite simple and complete analysis by both the researcher and the reader. Included are descriptions of the different disputes and weaknesses discovered in the research process. Appendix F provides the database used to sort the characteristics, categories, and statistics of each case and Appendix G provides a summary of each case.

B. POPULATION AND SAMPLE METHOD

The final population for this study consisted of 289 cases. The analyzed cases included all claim disputes decided by the ASBCA between 1 January 1998 and 30 June 1999. The acronym ASBCA and the term Board will be used interchangeably throughout this thesis. There was no restriction on the contract type, Government agency, or type of material/service rendered. The only prerequisite was that the Board had to have decided the appeal within the designated time period. Before this date, posted cases were sporadic, with several months worth of case decisions not posted. The researcher concluded that an 18-month window with an estimated 285 case population would be more than sufficient to support a valid analysis. The types of contract appeals decided

during this 18-month period included supply contracts, service contracts, and construction contracts.

C. DATA COLLECTION PLAN

As mentioned above, the estimated population of appeals was known early in the research process. In establishing the methodology, it appeared that the Board would decide approximately 285 cases by the end of June 1999. In addition, the population of appeals analyzed would be restricted to the ASBCA because of 1) DoD relevancy to research the questions, and 2) the diversity of cases decided. [Ref. 16: pp. 55-57]

Once extracted from either the ASBCA web page or the LEXIS database, the cases were listed and analyzed chronologically, by date of decision. Table 1 summarizes the search mechanism used in drawing down Board decisions.

LEXIS-NEXIS	contract OR decision AND date aft 12/31/97 AND date bef 7/1/99
ASBCA Website	http://www.law.gwu.edu/asbca

Table 1 ASBCA Data Base Searches

Source: Developed by the researcher

From each written Board decision, the researcher extracted various data elements for use in analyzing the appeals and identifying common elements of dispute and potential weaknesses in contracting practices throughout DoD. To standardize the data collection while researching each appeal, the researcher developed a data collection form which was used to summarize each appeal decision for later use in statistical analysis.

The researcher looked for key words in each decision in order to properly categorize the below-listed elements. For example, if the words “Government delay” or “delay caused by Government” were mentioned in the background section of the decision, that case was flagged under the Government delay category. If the appeal also mentioned “defective pricing” in the appeal background, that appeal was also flagged as a defective pricing dispute. This method worked equally well for identifying both Government and contractor weaknesses. The weaknesses appeared either in the findings of fact section of the appeal decision or in the decision narrative. Often, an appeal would identify several weaknesses of one or both parties. Again, the researcher discerned these weaknesses solely from the written content of each appeal decision. The common data elements drawn from the cases were as follows:

- Case Name
- Case Number
- Case Date
- Search Terminology
- Department of/Branch of Service
- Awarding Agency
- Location of Performance
- Contract Number
- Type of Contract: Procurement/ Service/Construction
- Dollar Value of Contract
- Dollar Value of Claim/Dispute

- Timeline
- Reason(s) for Dispute/Claim
- Court's Decision
- Government Weakness(es) Identified
- Contractor Weakness(es) Identified

The common data elements listed above were collected from the printed-out full-text version of each appeal decision. Appendix H contains a copy of the sample data collection form used in this research, and again, Appendix G summarizes each case.

D. HISTORICAL ASBCA DATA

Early in the research process, reviewing ASBCA FY 98 Annual Report, Appendix E, gave considerable insight into the current trends of appeals. These historical data are included in the thesis in order to have a baseline for comparison with the 18-month period studied.

1. Origin of Appeals Disposed of Between FY 1994-98

During the past five fiscal years, the origin of appeals disposed of by the ASBCA originated from all branches of DoD. The Board also decided contract disputes for a variety of other Agencies within the Federal Government on a case-by-case basis. Table 2 describes these cases as "Other."

	FY94	FY95	FY96	FY97	FY98
U.S. Air Force	359	287	305	177	131
U.S. Army	450	551	429	277	160
Corps of Engineers	*	*	*	111	110
U.S. Navy	487	357	349	375	254
DLA	182	97	126	106	131
NASA	9	8	11	22	19
Other	73	164	126	57	41
Admin Disposals	23	14	28	16	9

* Previously counted under U.S. Army

Table 2 Sources of Appeals Disposed of Between FY 1994-1998

Source: ASBCA FY 98 Annual Report

2. Disposition of Appeals FY 1994-98

The ASBCA FY 98 Annual Report provided statistics regarding the appeals disposed of by the ASBCA between FY 1994-1998. Several facts stood out. First, the largest percentage of claims brought before the ASBCA were dismissed. In a telephone interview, a Judge on the ASBCA explained that the highest percentage of dismissals were due to: 1) the appeal being withdrawn in favor of another product of settlement; 2) the scope was outside the Board's jurisdiction; 3) presentation of additional facts that involved fraud or some other form of criminal activity; or 4) both parties agreeing to drop the case and choose an Alternative Dispute Resolution method. [Ref. 17] The ASBCA FY 98 Annual Report also points out that the Board's ADR services were requested 63 times covering 81 appeals, all of which were settled without an appeal to the Board.

The data also indicated that the number of denied decisions generally outnumbered the sustained decisions. Furthermore, the number of appeals decisions appears to be declining. See Table 3 and Figure 1 below:

	1994	1995	1996	1997	1998
Dismissed	1150 (72%)	1083 (73%)	969 (70%)	823 (72%)	583 (68%)
Denied	225 (14%)	227 (15%)	216 (16%)	175 (15%)	118 (14%)
Sustained	208 (13%)	168 (12%)	199 (14%)	143 (13%)	154 (18%)
Total	1583	1478	1384	1141	855

Table 3 ASBCA Decision History
Source: ASBCA FY 98 Annual Report

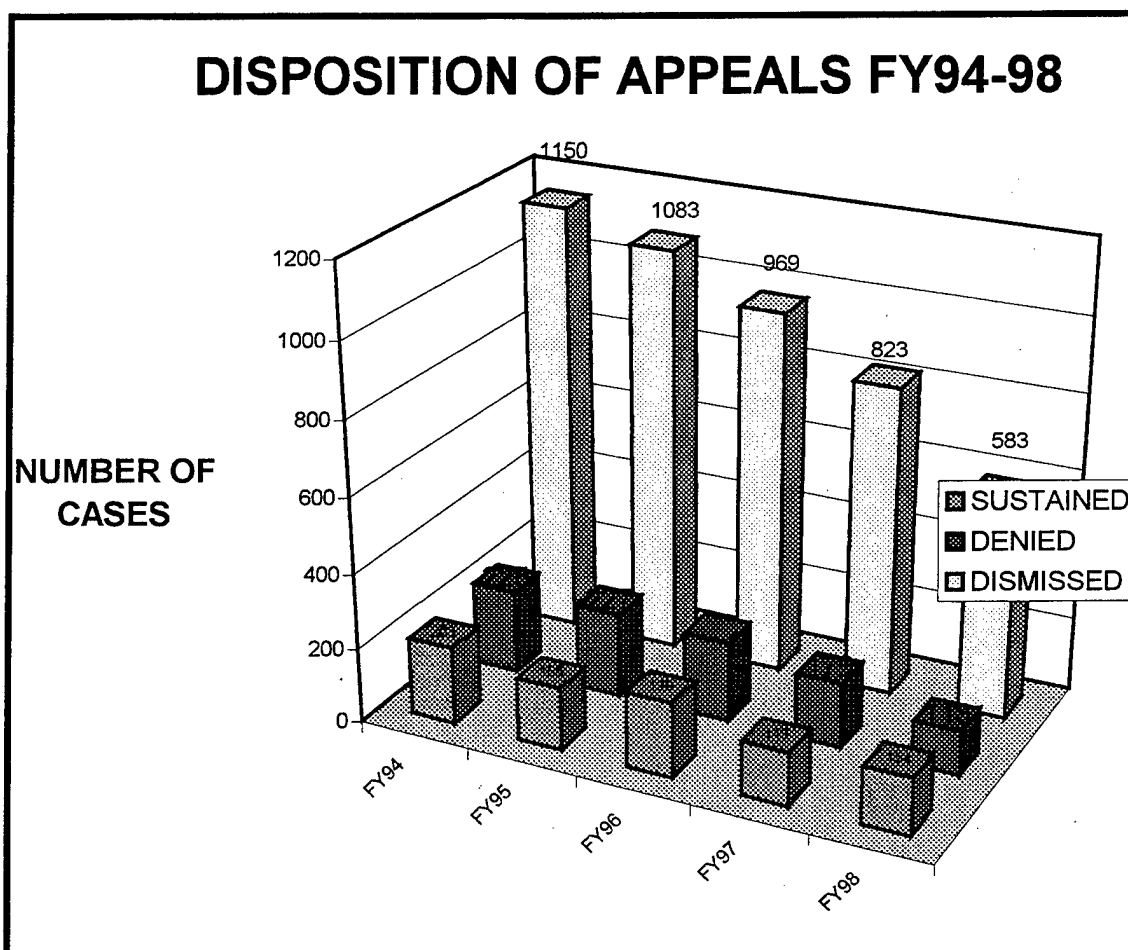


Figure 1 ASBCA Decision History
Source: ASBCA FY 98 Annual Report

Finally, the data show a close correlation between sustained/denied decisions of the ASBCA and that of the researcher's data.

E. PRESENTATION OF RESEARCH DATA

As mentioned previously, this research will include all appeals decided by the ASBCA between 1 January 1998 and 30 June 1999. The primary rationale for focusing on recent ASBCA decisions was to analyze "current trends" of disputes and weaknesses in contracting practices to determine what problems are currently arising. This research will help the reader understand the current and potential future acquisition problems, and ASBCA ruling trends with respect to the type of contract dispute.

1. Customer Agency

The customer agency refers primarily to the branch of service within the DoD, although the Board also hears cases outside of DoD as we will see later in this subsection. The research data correlates with the FY94-98 historical data. The U.S. Navy had the highest number of cases disposed of by the ASBCA, followed by the U.S. Air Force and the U.S. Army (see Table 4 and Figure 2).

U.S. Navy (includes NAVFAC)	U.S. Air Force	U.S. Army	Corps of Engineers	Defense Logistics Agency	Marine Corps	NASA
88	73	51	24	16	5	5
33.6%	27.9%	19.5%	9.2%	6.1%	1.9%	1.9%

Table 4 DoD Customer Agencies with Disputes Settled by ASBCA Jan 98 – Jun 99

Source: Developed by the researcher

Note that the U.S. Army Corps of Engineers has been counted separately from the U.S. Army since 1997. The U.S. Navy continues to include appeals originating from the Naval Facilities Engineering Command under U.S. Navy total appeal statistics.

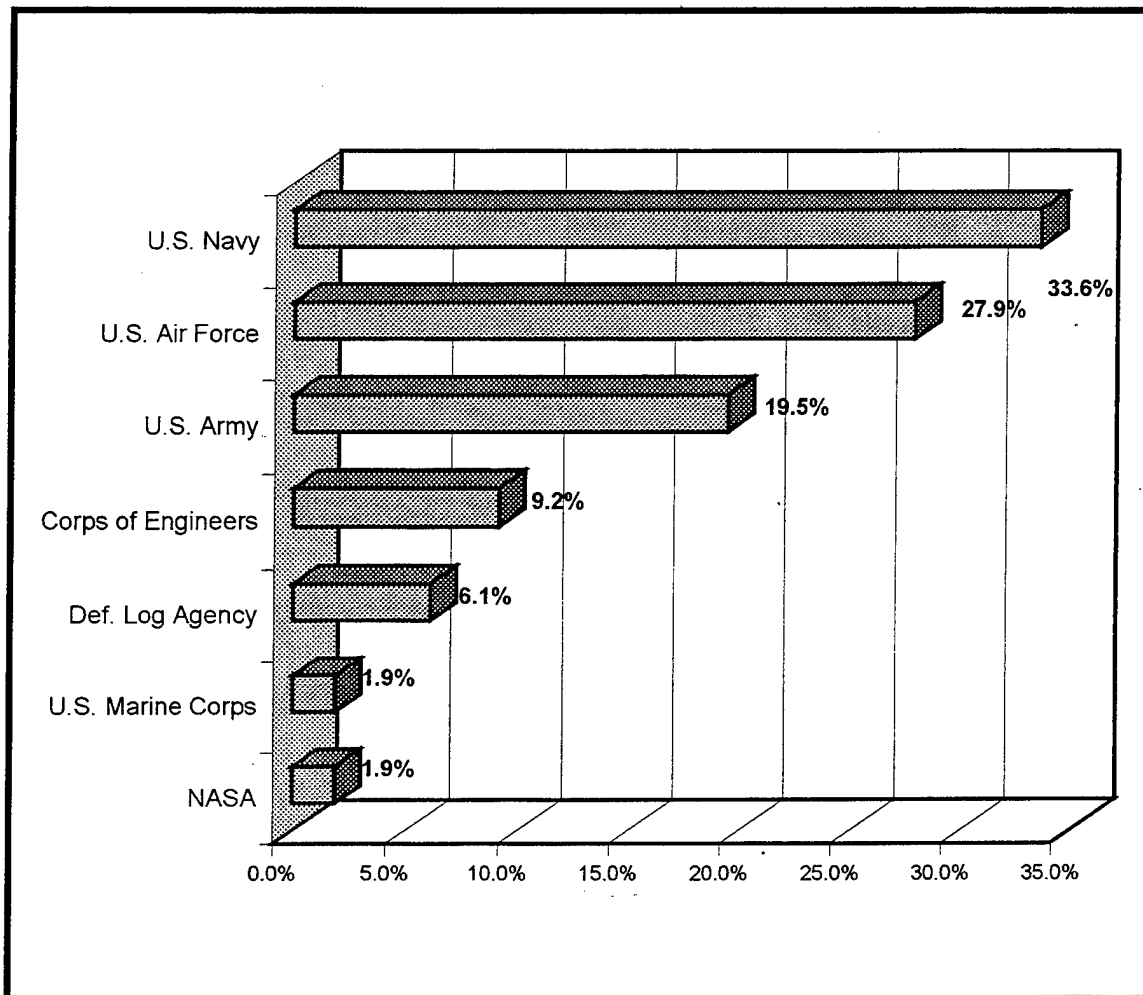


Figure 2 DoD Customer Agencies with Disputes Settled by ASBCA Jan 98 – Jun 99
Source: Developed by the researcher

As discussed earlier, the ASBCA also decides appeals from other Federal Agencies. Their statistics are shown below in Table 5 and Figure 3.

Health & Human Services	Dept. of Intl Devel.	Dept. of State	Dept. of Labor	Natl. Imaging & Mapping	Reutil. & Marketing Service	FAA	Health, Educ & Welfare	Dept of Energy
10	5	4	2	2	1	1	1	1
37.0%	18.5%	14.8%	7.4%	7.4%	3.7%	3.7%	3.7%	3.7%

Table 5 Non DoD Agencies with Disputes Settled by ASBCA Jan 98 – Jun 99
Source: Developed by the researcher

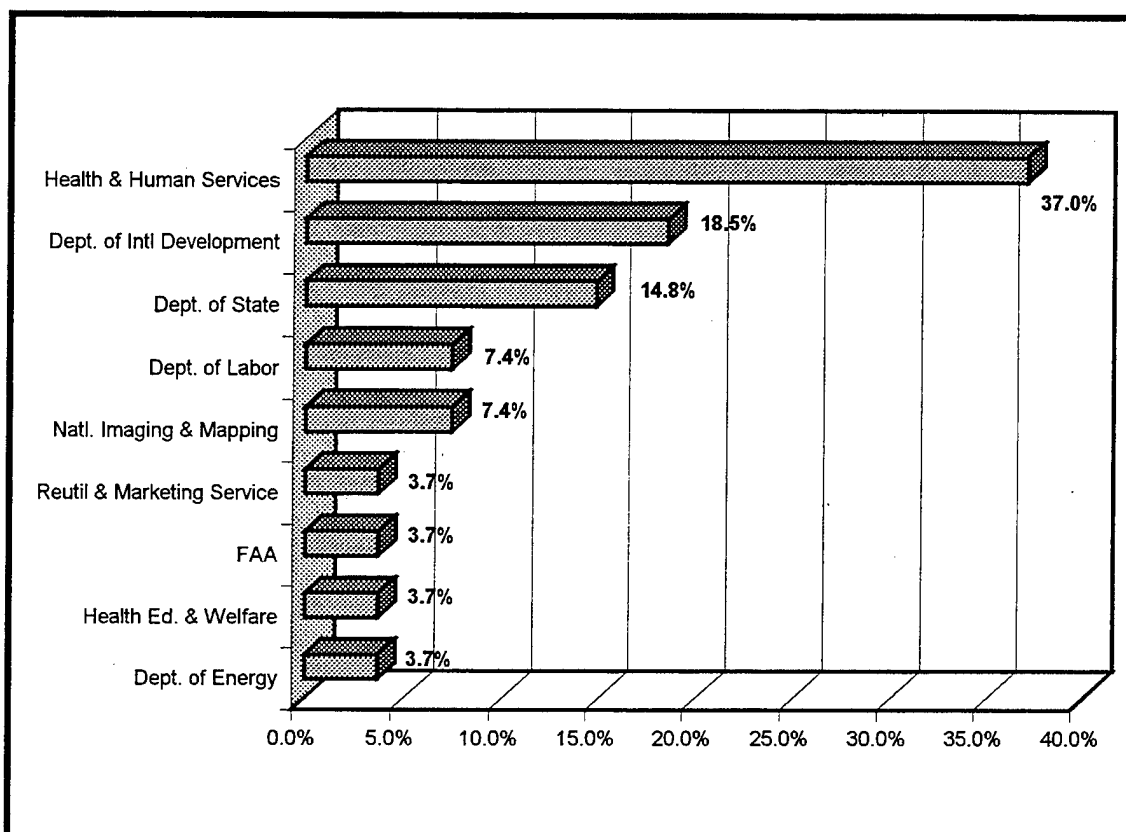


Figure 3 Non DoD Agencies with Disputes Settled by ASBCA Jan 98 – Jun 99

Source: Developed by the researcher

2. Type of Contract

The majority of the contracts litigated were Firm Fixed Price (FFP) contracts, which are relatively inflexible and present little risk to the Government, shown in Table 6 and Figure 3. Among the least litigated were Cost Plus contracts, which offer less flexibility and a higher risk to the Government, while controlling costs to a much lesser degree.

Firm Fixed Price (FFP)	Delivery Order	Purchase Order	CPFF	FPIF	Basic Ordering Agreement	CPAF	Job Order	Time/Matls
134	38	13	6	6	4	3	2	1
64.4%	18.8%	6.3%	2.9%	2.9%	1.9%	1.4%	1.0%	.5%

Table 6 Disputed Contract Types

Source: Developed by the researcher

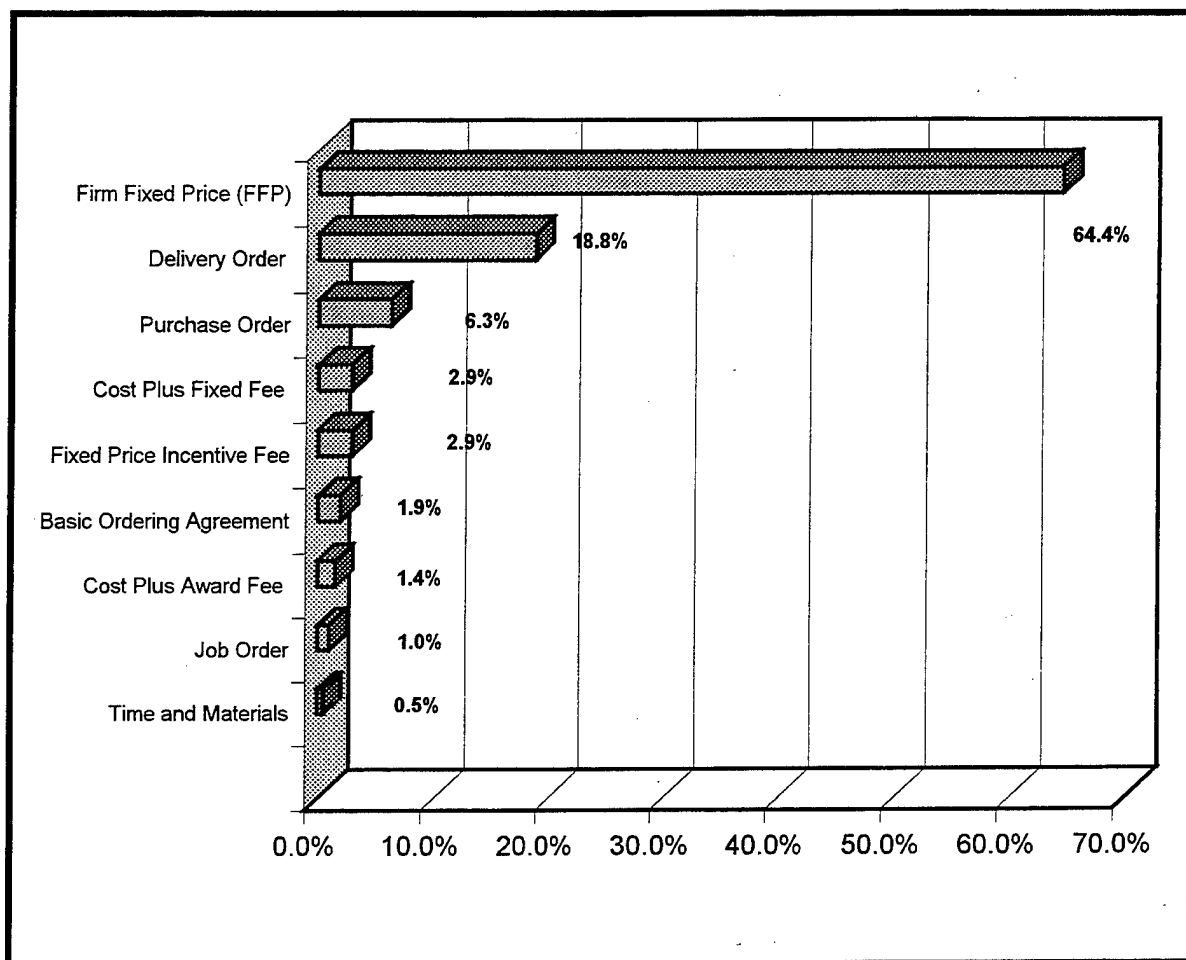


Figure 4 Disputed Contract Type
Source: Developed by the researcher

3. Disputed Claim Amount

The disputed amount yielded no describable data. Disputed amounts spanned the spectrum from claims under \$25,000 to claims in excess of \$1,000,000, as Figure 5 shows. In relatively few cases did the contractor actually collect the entire amount of the original claim. This was largely due to split decisions, in which the Judge awarded damages for one point in the claim, yet denied another segment of the claim. Furthermore, the appellant's claims often were for costs in excess of allowable costs.

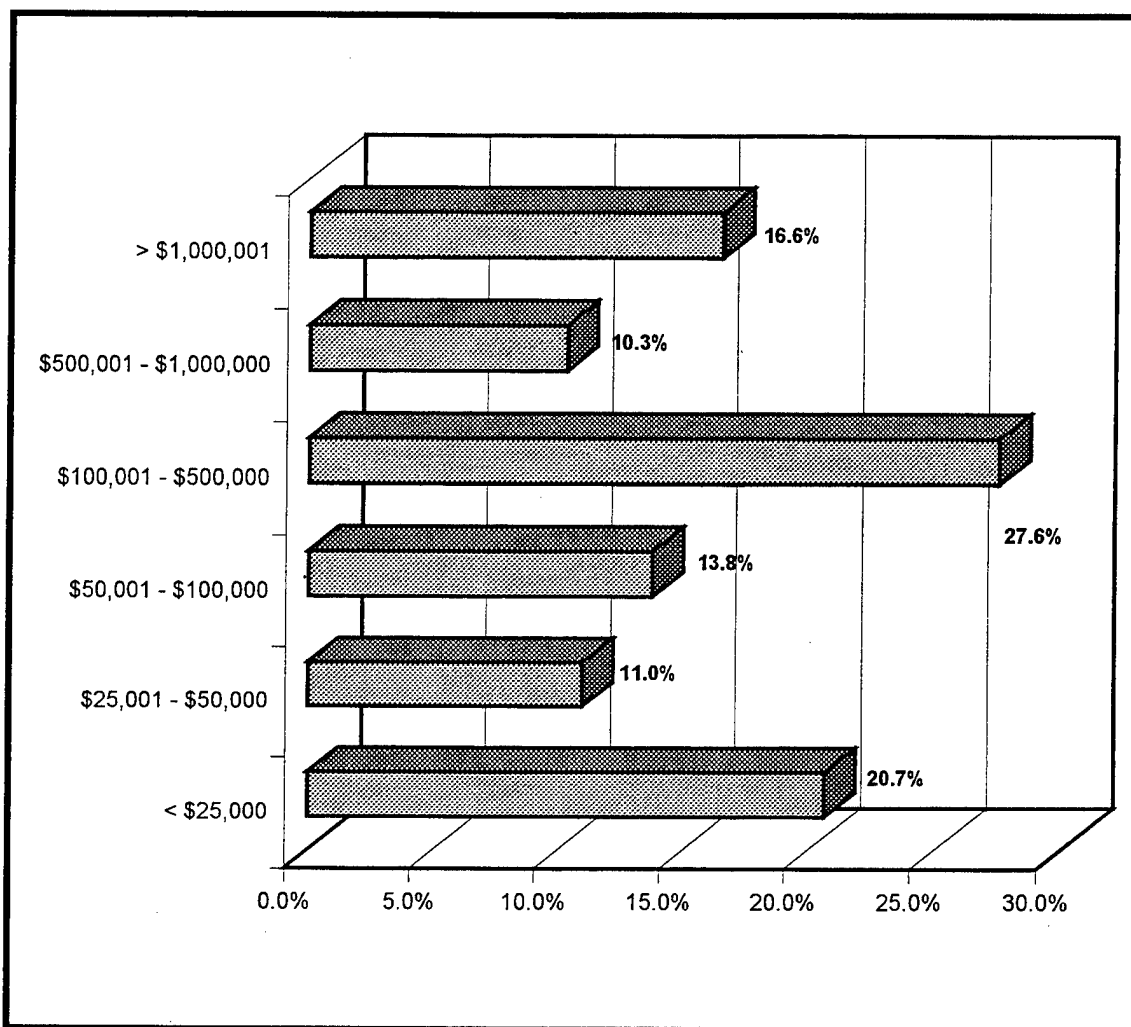


Figure 5 Dispute Amount

Source: Developed by the researcher

4. Sustained versus Denied ASBCA Decisions

When a contractor perceives a CO's final decision on a disputed claim to be unfair, he or she must decide whether or not to appeal the decision. The contractor must weigh the amount involved in the dispute against the potential award. Even if the contractor wins, the cost of the appeal could exceed the amount recovered. According to the FY94-98 historical ASBCA data presented in Section D of this chapter, the number of sustained

versus denied decisions identified by the research data collected between January 1998 and June 1999 follows the prevalent outcome, or trend for the ASBCA.

The data extracted from the 289 litigated cases indicated, as shown in the ASBCA decision summary, Table 7 and Figure 6, that 118 cases, or 42.0%, were denied in their entirety; 66 cases, or 23.5%, were sustained; 48 cases, or 17.1%, were denied a request for summary judgment and are pending; 28 cases, or 9.3%, were dismissed; and 23 cases, or 8.2%, were split decisions. Denied decisions are judgments in favor of the respondent (who is the Government in 97% of all appeals). Sustained decisions were judgments in favor of the appellant. Summary judgments, as described in Chapter II, are motions to decide the appeal based on the material facts. The researcher placed an appeal in this category only when a motion for summary judgment is denied due to dispute over material facts. The case is then considered pending, awaiting a full hearing. [Ref. 17] The Board still reviews the facts, thereby producing other significant appeals data. A dismissed decision generally occurs in cases of untimely appeals over which the Board had no jurisdiction. This does not correlate directly to the historical ASBCA data because the ASBCA also included dismissals that never made it to the appeals process. In these cases, the parties elected a different form of settlement, including ADR. [Ref. 17] Finally, split decisions occurred when there were multiple elements to the dispute, and the judge(s) denied some elements and sustained others.

Denied	Sustained	Summary Judgment	Dismissed	Split
118	66	48	28	23
42.0%	23.5%	17.1%	9.3%	8.2%

Table 7 ASBCA Decision Summary
Source: Developed by the researcher

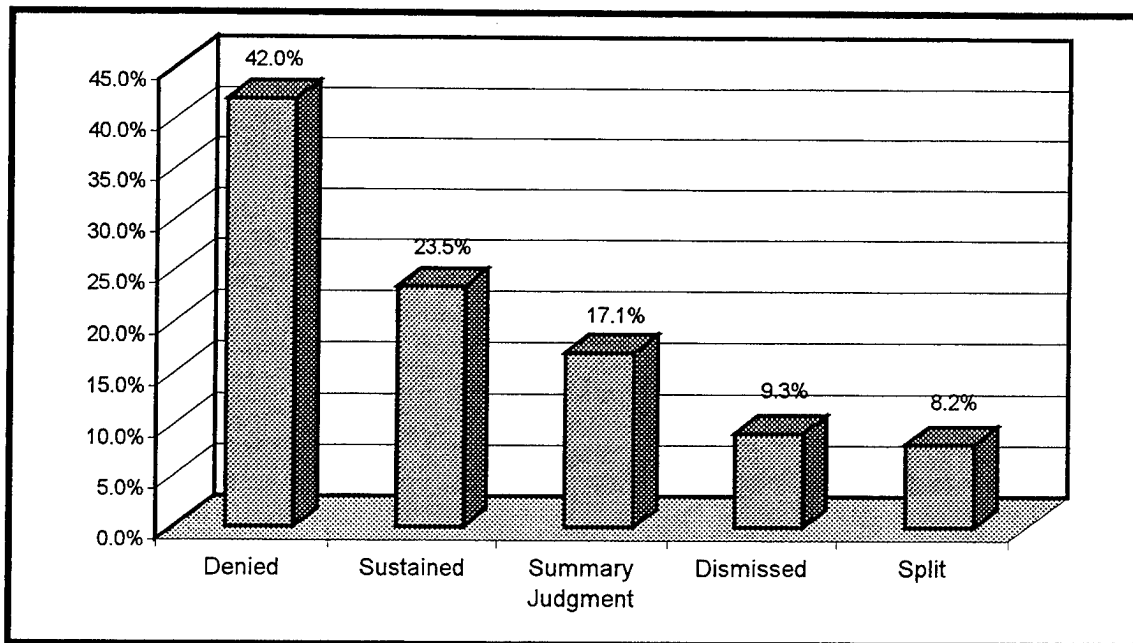


Figure 6 ASBCA Decision Summary January 1998 – June 1999

Source: Developed by the researcher

Figure 7 shows the percentage breakdown if only denied and sustained decisions are considered.

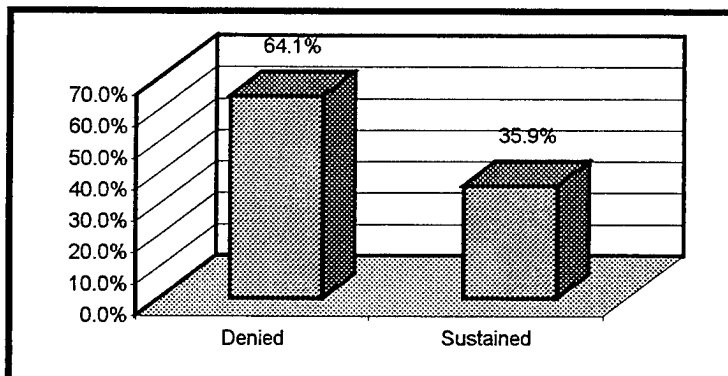


Figure 7 ASBCA Decision Summary January 1998 – June 1999

Source: Developed by the researcher

Note that the decisions identified totaled 281; the actual number of appeals reviewed and analyzed totaled 289. In eight of the cases, the appeal decision was not specified.

5. Type of Procurement Requirements Litigated

Procurement types yielded no significant trends. Of the 289 appeals reviewed and analyzed, 258 were supply, services, or construction contract disputes; 19 appeals were for fees incurred in successfully appealing a previous decision under the Equal Access to Justice Act (EAJA); and 12 appeals did not specifically state the type of contract in dispute. Only supply, services, and construction disputes will be discussed further; they are summarized in Table 8 and Figure 8 below:

Procurement	Services	Construction
90	85	83
34.9%	32.9%	32.2%

Table 8 Type of Requirement in Litigation

Source: Developed by the researcher

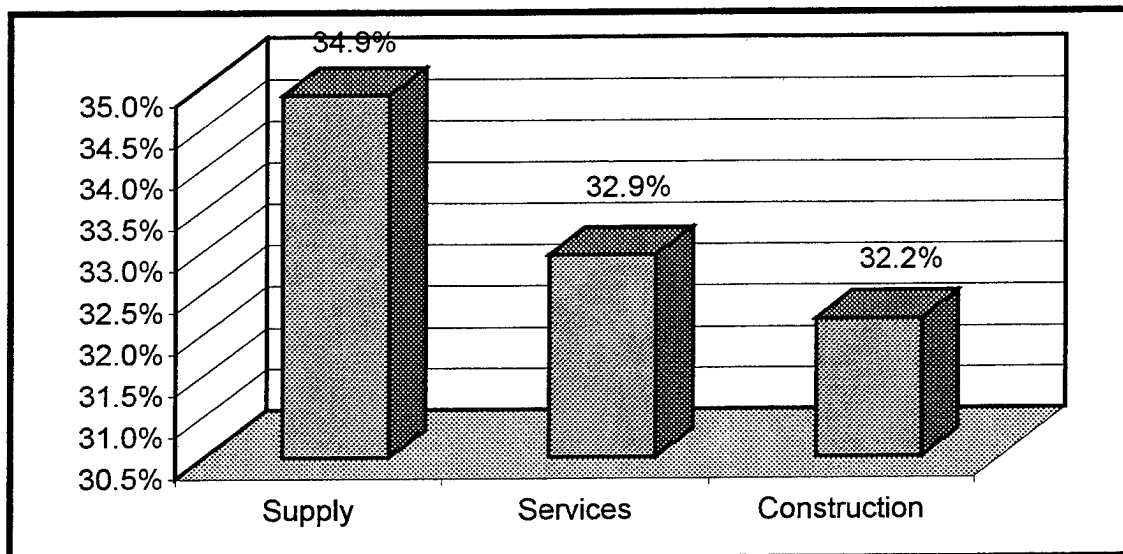


Figure 8 Type of Requirement Disputed

Source: Developed by the researcher

F. PRESENTATION OF RESEARCH DATA: CATEGORIES OF DISPUTES

Of the 289 cases analyzed, all but a few could be categorized into one of the 22 categories. Many of the written case decisions lacked some basic background data, making it somewhat difficult to categorize a particular case on its common elements. Even without this information, though, the researcher was generally able to determine the root cause of the dispute and analyze the subsequent weaknesses of both the Government and contractor. In all appeals cases, key words in the decision discussion proved helpful. In several of the appeals, there were two or more common elements of dispute.

1. Categories of Dispute/Claim

The reasons for dispute were relatively easy to determine upon reading the first 100 cases printed from the LEXIS database. What would prove more difficult would be analyzing the parties' weaknesses. (Weaknesses of both the Government and contractor will be addressed in the next section.) The researcher identified 22 different reasons (categories) for litigating a contract before the Board. Figure 9 lists these categories. It is important to note that 103 (35.6%) of the 289 contract cases had more than one reason for dispute. For example, *Technocracia, ASBCA 48439* involved allegations of constructive changes, differing site conditions, and compensation for Government delays. Therefore this case is counted as a multi-dispute case.

The following sections present, in descending order, the 22 recurring reasons or categories for contract dispute. Each section briefly describes the criteria for categorization, as well as the number of occurrences in each category. Since the categories are based on the exact descriptive wording in each case, two or more dispute

categories may appear to overlap when, in fact, the background of each case is noticeably different. Chapter IV will analyze the top ten contract dispute categories.

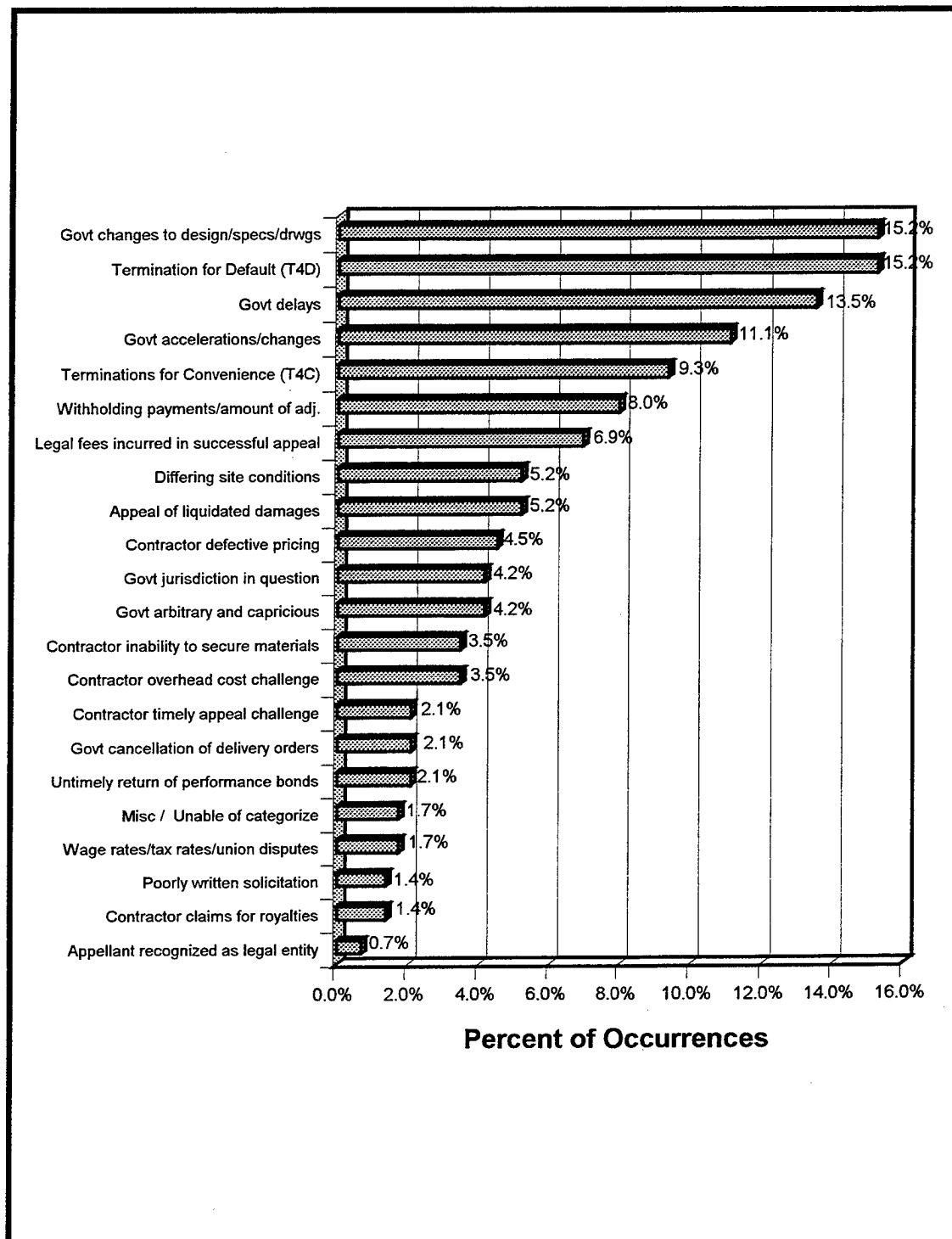


Figure 9 Categories of Contract Dispute
Source: Developed by the researcher

a. *Government Changes to Designs/Specifications/Drawings*

The collected data identified 44 disputes in which the root cause was Government directed changes to product or service design, specifications and/or drawings. This category involved primarily contracts to supply or procure very specific materials or services.

b. *Government Termination for Default*

The collected data identified 44 disputes in which the contractor was terminated for default (T4D) by the Contracting Officer (CO) due to various identified contractor weaknesses.

c. *Compensation for Government Delay(s)*

The collected data identified 39 cases where alleged Government delays caused a dispute by the contractor. An example is the inability of the Government to identify and remove interference, coordinate work of other Government elements, identify requirements for special access, and coordinate special passes for personnel and vehicles.

d. *Government Accelerations or Other Constructive Changes without Equitable Adjustment*

The cause of the dispute in 32 appeals cases was accelerations or constructive changes claimed by the contractor. Constructive changes and accelerations were claimed primarily when the Government sought a more favorable delivery schedule.

e. *Government Termination for Convenience (T4C)*

In 27 appeals cases, Government termination for convenience (T4C) led the contractor to file a claim. The Government typically sought a T4C, citing the absence of need for the particular item or service under contract.

f. Withholding/Delay of Payments or Amount of Equitable Adjustment.

The data indicated that 23 disputes involved the contractor claiming that the Government improperly withheld or delayed progress payments or final payment, or improperly calculated an equitable adjustment.

g. Contractor's Fee's Incurred in Successfully Defending/Winning Protests/Claims against the Government

In 20 appeals cases, the contractor appealed to the Board for fees incurred in successfully defending and/or winning a previous appeal against the Government under the Equal Access to Justice Act (EAJA). The following is a partial definition of EAJA:

A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this [statute]. [5 U.S.C. @ 504 (a) (2)]

There were no cases in which the prevailing party was denied compensation under the EAJA, unless the Board deemed the contractor was untimely—that is, application not submitted within the specified 30-day time limit.

h. Differing Site Conditions

The data revealed 15 cases in which the dispute(s) alleged differing site conditions. The common problem for most contract appeals in this category involved natural soil and water erosion, or drawings and specifications that did not match actual site conditions.

i. Contractor Appeal of Liquidated Damages (LD) Collection(s)

Fifteen appeals cases involved an assessment of liquidated damages (LD) assessed by the CO due to late deliveries of products or services, or untimely completion of construction projects.

j. Contractor Appeal to Government Allegations of Defective Pricing

The data revealed 13 appeals cases which alleged contractor defective pricing. This type of dispute generally resulted from suspected contractor overcharging, usually inflated prices of spare parts, overhead rates and/or labor rates. Overcharges are generally caught during an internal audit or Defense Contract Audit Agency (DCAA) audit.

k. Government Jurisdiction Challenge

Twelve appeals cases involved Government jurisdiction. This type of dispute arose as a Government counter claim involving bribery, criminal activity or other matters not directly involving contract disputes.

l. Government Withholding Information/Unfair (Arbitrary & Capricious) Business or Competition Practices

This category contained 12 appeals. Alleged arbitrary and capricious behavior by the Government, and particularly the Contracting Officer was the cause for a contractor appeal.

m. Contractor Inability to Secure Material(s)

In ten appeals cases, the contractor's inability to secure materials required to perform the contract prompted the contractor to file an appeal for equitable adjustment.

n. Contractor Overhead Cost Challenges

The researcher identified ten appeals cases in which the dispute arose because the contractor exceeded overhead costs due to a variety of reasons, including alleged Government delays and subsequent idle capital.

o. Contractor Timely Appeal Challenge

Six appeals cases alleged untimely appeals. ASBCA rules clearly define a timely appeal as being filed 90 days from receipt of the COFD. The burden is on the appellant to prove that the 90-day threshold was not exceeded.

p. Cancellation of Delivery Orders at Government Request

The data revealed six cases involving the Government's request to cancel an outstanding delivery order, purchase order, or job order.

q. CO Failure to Return Performance Bond/Guarantee(s)

In six appeals, the CO either failed or refused to return the contractor's performance bond/guarantee. This type of dispute deals exclusively with construction contracts where the contractor must procure a performance bond. The CO can use most bonds as liquid assets to collect on liquidated damages owed the Government.

r. Miscellaneous

Five appeals that fit this category. Generally, these cases have little to do with contracting. It should be pointed out that the researcher used no subject matter screening process when drawing down ASBCA cases for analysis.

s. Wage Rate/Tax Disputes/Union Disputes

The data revealed five appeals cases in which the contractor protested the wage rates, due to Department of Labor wage rate changes or state tax rates, or Union wage rates.

t. Poorly Written Solicitation(s)

Four appeals cases involved poorly written solicitations. The contract appeal involved the Government's failure to identify drawings or require proper site surveys, or inadequate Government estimates of required material or services.

u. Value Engineering Change Proposal (VECP)/Profit or Royalty Claim(s)

In four appeals cases, the contractor claimed the Government was using or benefiting from, information or technology the contractor provided in the form of a VECP without consent or equitable adjustment.

v. Recognize Appellant as a Legal Entity

In two disputes, the Government challenged the firm on a counter-dispute as not being a legal entity and having no legal standing due to contractor bankruptcy.

G. PRESENTATION OF RESEARCH DATA: GOVERNMENT AND CONTRACTOR OBSERVED WEAKNESSES

1. Observed Weaknesses in Government Contracting Practices

One of the two primary areas of focus in this thesis is weaknesses in Government practices. The researcher acknowledges that these observations can be both objective and subjective. Subjectivity hinges around the researcher's interpretation of key words used within the text of the appeal decisions to categorize each appeal. In many instances, more

than one weakness was identified in either of the two parties. Figure 10, below provides graphic insight into the common problems and weaknesses within Government contracting activities.

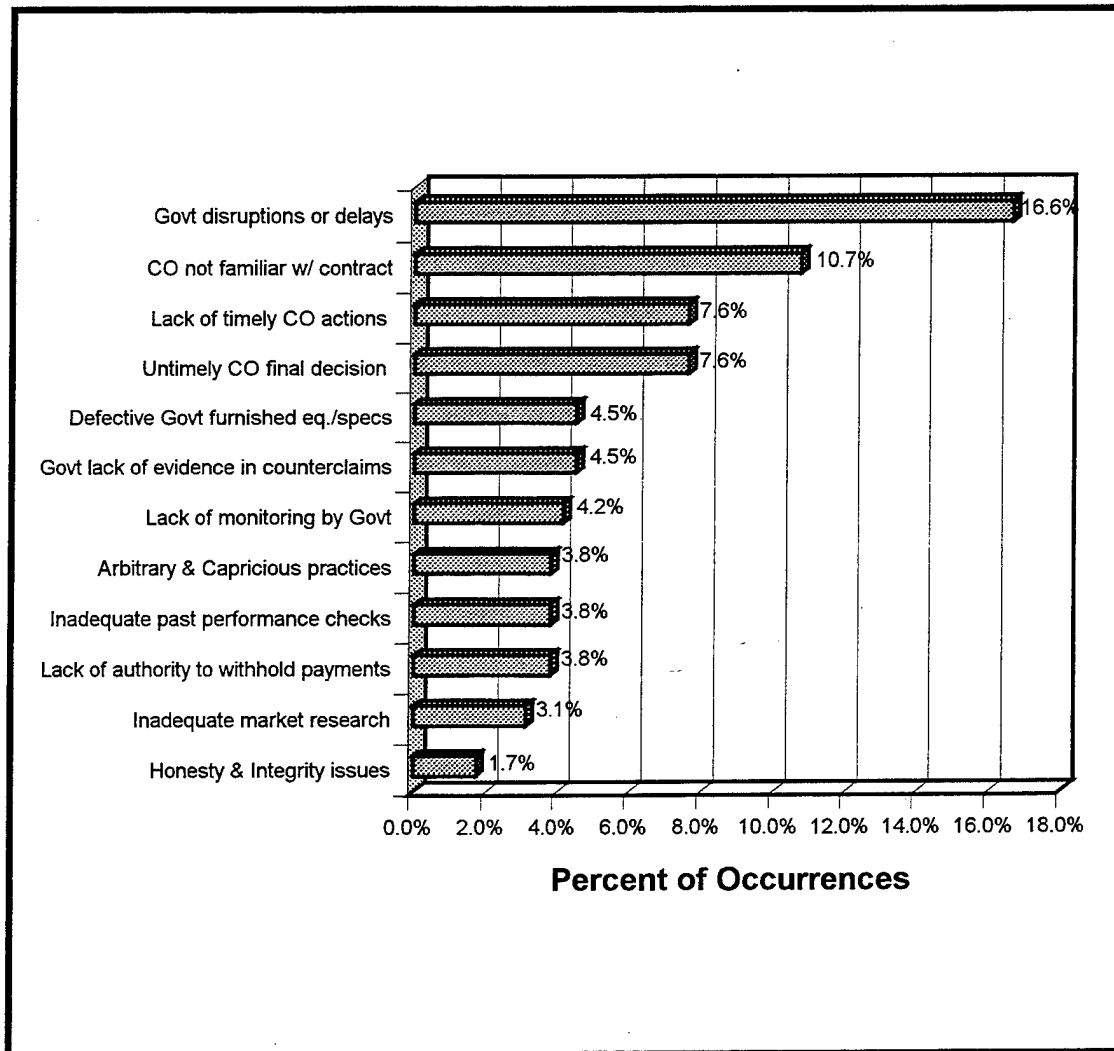


Figure 10 Observed Weaknesses in Government Contracting Practices
Source: Developed by the researcher

Listed below, in descending order, are of identified Government contracting weaknesses, the number of appealed cases under each category, and a brief description of each category:

a. *Government Disruptions, Delays, or Changes*

The data revealed 48 incidents in which the Government allegedly disrupted the contract with conflicting directions, untimely delays, multiple change orders, etc., causing the contractor to submit a claim for equitable adjustment.

b. *Contracting Officer Not Familiar with the Contract*

In 31 cases, the CO was obviously not familiar with the contract terms, including labor rates, premium pay, return of performance bonds, etc. This directly contributed to a contract dispute.

c. *Lack of Timely Contracting Officer Action*

Twenty-two cases exhibited a lack of timely CO action, which contributed to the contractor's confusion and subsequent appeal. This category applied mainly to complex ship repair contracts, interpretation of construction specifications, and responses to contractors' technical questions.

d. *Untimely COFD*

In 22 cases, an untimely Contracting Officer's final decision (COFD) was noted as a factor. When a COFD was untimely, the contractor considered it a denial of his or her claim and filed a premature appeal.

e. *Defective Government Furnished Equipment (GFE) or Specifications*

The data revealed 13 incidents of Government weaknesses involving defective GFE or specifications. This weakness largely involved the Government agency issuing GFE to the contractor in ill repair or unworkable condition.

f. Lack of Evidence/Proof

In 13 instances, the Government clearly was unable to disprove a contractor allegation of Government delays, differing site conditions, etc.

g. Lack of Contract Monitoring by Government

In 12 cases, the Government provided inadequate contract monitoring, which contributed to the contractor's confusion, cost overruns, and resolution of specification contract questions.

h. Arbitrary & Capricious Practices

The data revealed 11 incidents involving arbitrary and capricious Government practices. These practices included the CO's inflexibility and inconsistency in interpreting contract terms, delivery schedules, or specifications, and issuing a termination for default (T4D) without justifiable cause.

i. Inadequate Past Performance Checks

In 11 cases, it was obvious that any past performance investigation would have resulted in a negative responsibility determination due to a documented history of poor contract performance.

j. Lack of Authority to Hold or Withhold Entitlements

The data revealed 11 incidents in which the CO mistakenly withheld entitlements from the contractor, anticipating a liquidated damages assessment. In these instances, the Government withheld invoice payments, progress payments, or final payments.

k. Inadequate Market Research

In nine instances, inadequate market research contributed greatly to the contract in litigation. With minimal market research, the Government would have concluded that the contractor was incapable of completing the contract.

l. Integrity/Honesty

The data revealed five incidents involving integrity/honesty failures. In two cases, the same contractor bribed a Government purchasing clerk for the names of interested bidders and other miscellaneous contracting information. Three other appeals involved using the Government purchase card to circumvent an existing automobile parts contract with slower deliveries.

2. Weaknesses Found in Contractor Practices

Observed weaknesses in contractor practices is the other main focus of this thesis. Again, these observations can be both objective and subjective. Subjectivity hinges on the researcher's interpretation of key words used within the text of the appeal decisions to categorize each appeal. In many instances, more than one weakness was identified for either of the two parties. Figure 11 below provides a graphic presentation of the commonly observed contractor weaknesses.

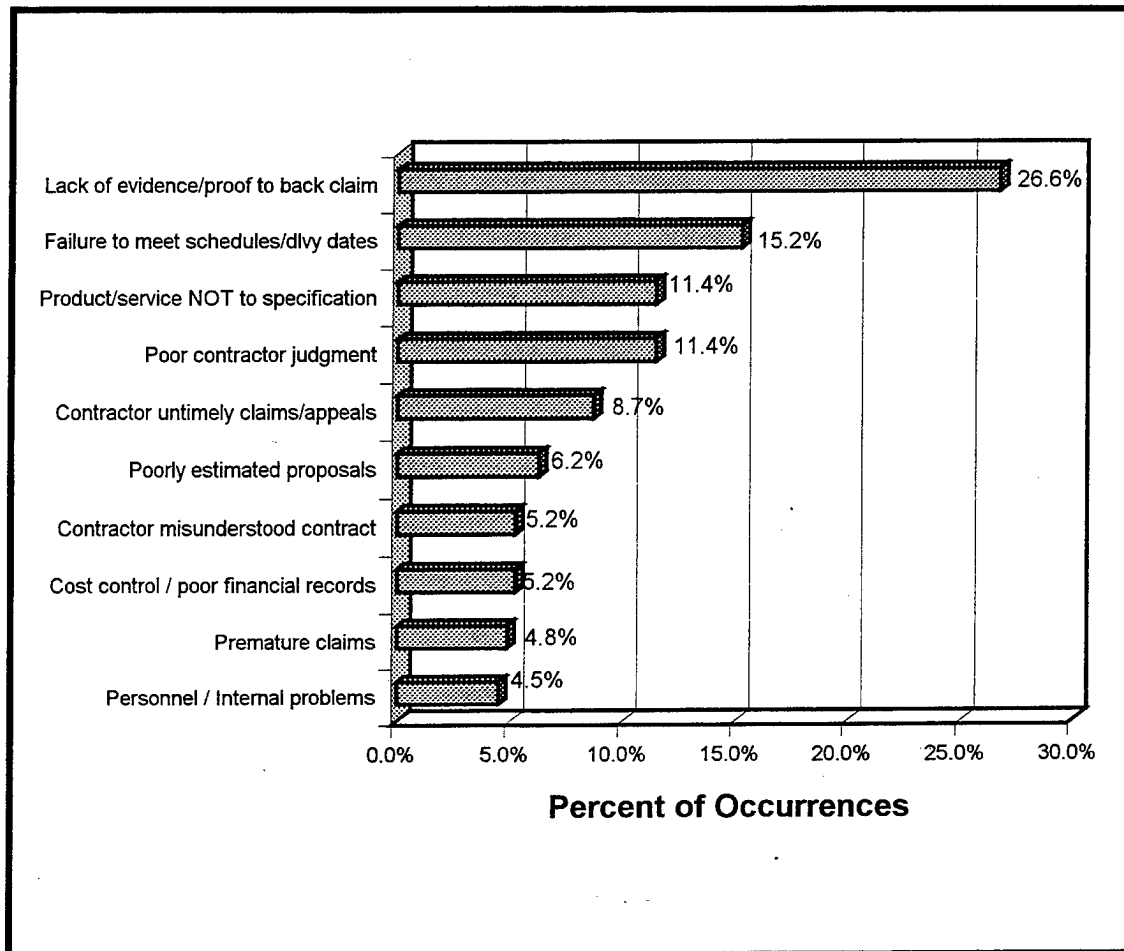


Figure 11 Observed Weaknesses in Contractor Practices

Source: Developed by the researcher

Chapter IV will provide an in-depth analysis of the top five contractor weaknesses. Listed below, in descending order, are the categories of identified contractors' contracting weaknesses, the number of appealed cases under each category, and a brief description of that category.

a. *Lack of Evidence/Proof of Allegation*

The data revealed 77 incidents in which the contractor failed to meet the burden of proof. Although this category is not directly related to contracting, it is significant that contractors file claims and subsequent appeals that often end in a denial by

the CO and by the Board. This fact will be analyzed in Chapter IV. Generally, the contractor was unfamiliar with the Board's expected level of evidence. [Ref. 17]

b. Failure to Meet Schedules or Delivery Dates

This was the most common contractor weakness, with 44 incidents. There is little evidence to show that the Government was unduly unreasonable. In fact, in two cases the Board commented that the CO was excessively patient.

c. Product or Service NOT to Specification

The data revealed 34 incidents in which the contractor failed to meet established and agreed-upon specifications.

d. Poor Contractor Judgment

This area was broad, with 33 instances of bribery, criminal activity, poor solicitations, lack of site surveys, and personnel problems, all of which contributed to an eventual contract dispute with the Government.

e. Untimely Appeals

The data revealed 25 incidents of untimely appeals. This category involves disputes that may have been won if the contractor had appealed on time, including untimely appeals for legal expenses in a case that the contractor previously won. The Board will dismiss an appeal received after the specified time limit.

f. Poorly Estimated Proposals

In 18 cases, the cause of the dispute was a poorly estimated proposal. This resulted from the contractor's inexperience in the production of the material and the execution of that type of service, as well as from a poor site survey in which patent defects should have been discovered.

g. Contractor Misunderstood the Contract

In 15 incidents, it was apparent that the contractor misunderstood the contract. In particular, construction specifications, interpretation of MILSPECS, delivery schedules, and first article testing criteria were the common areas of misinterpretation.

h. Cost Control or Poor Financial Record Keeping

In 15 cases, the contractor experienced cash flow or liquidity problems, which contributed to contract disputes over late deliveries and products not to specification.

i. Premature Claim

The data revealed 14 incidents of contractor weaknesses in this category. This weakness stems from bypassing the CO, not waiting for the COFD, or submitting a claim before all the factual evidence was gathered by both parties.

j. Personnel or Internal Problems

This category was set aside for contractors with unplanned personnel losses and lack of coordination within their firm. There were predictably few cases in which the Board included this observation in their findings of facts. However, this researcher identified 13 instances of this weakness. Personnel and internal problems were observed to be more prevalent in the smaller businesses.

H. SUMMARY

This chapter described the population and time period from which the research data were collected. The chapter then illustrated the data collection methods. Additionally, this chapter grouped the data into general categories. Chapter IV will

presented thus far, and will attempt to identify trends and potential Government weaknesses, and particularly, weaknesses in DoD acquisition contracting practices.

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IV. DATA ANALYSIS

A. INTRODUCTION

This chapter first provides an analysis of dispute characteristics in various breakdowns in order to familiarize the reader with the nature of recent disputes. The chapter then takes a closer look at the reasons contracts are disputed and analyzes the ten most frequent reasons. Finally, this chapter analyzes the most frequently recurring Government and contractor procedural weaknesses. Again, the Armed Forces Board of Contract Appeals (ASBCA) decided the cases analyzed between January 1998 and June 1999. The database used to collect, sort, and break down the various statistics is included in Appendix F. A summary of each case is located in Appendix G, including both the cause of dispute and the identified weaknesses of both Government and contractor organizations.

B. ANALYSIS OF APPEALS DISPUTE CHARACTERISTICS

This section presents various dispute characteristics identified from the researcher's data and provides a brief analysis of identified trends. Since Department of Defense (DoD) appeals made up 91% of all appeals decided by the ASBCA between January 1998 and June 1999, emphasis will be placed on the nature of DoD disputes. The following areas are reviewed and analyzed in this section:

- DoD agency versus sustained/denied record;
- DoD agency versus type of requirement;
- Single versus multi-dispute appeals;
- Type of DoD service versus ASBCA decision;

- Government dispute initiation versus contractor appeals record;
- Small Business Administration (SBA) appeals record versus Government; and
- Reconsideration appeals record of previous ASBCA decisions.

1. DoD Agency versus Sustained/Denied Record

The data indicates that, with few exceptions, the number of denied decisions outnumbered the sustained decisions. The only real break in this trend was with NASA and the U.S. Army, both of which will be discussed. All other DoD agencies loosely fit the established trend of a 65% denial rate and a 35% sustainment rate. Figure 12 shows the frequency of denied versus sustained decisions within each DoD agency. Figure 13 indicates percentages of denied versus sustained decisions within each DoD agency.

With NASA, the data indicate that Government changes, disruptions and delays, Contracting Officer (CO) not familiar with contract terms/language, untimely Contracting Officer's final decision (COFD), and inadequate contractor monitoring were the recurring identified weaknesses with NASA's contracting practices.

Weaknesses within the U.S. Army's contracting practices are more diverse. The data indicated that five of the 15 sustained decisions resulted from Government disruptions, changes, or delays; three resulted from inadequate market research; and two sustained decisions were due to improper delay of payments. Other, less frequent weaknesses led to the remaining sustained decisions; these included defective Government Furnished Equipment (GFE), honesty and integrity issues, and CO lack of familiarity with the contract.

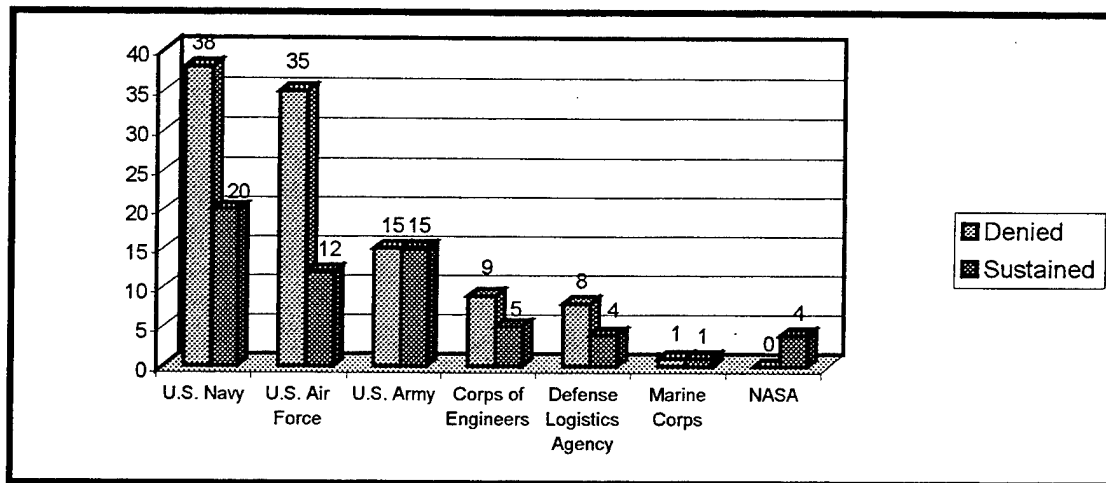


Figure 12 Frequency of Denied/Sustained Decisions by DoD Agency

Source: Developed by the researcher

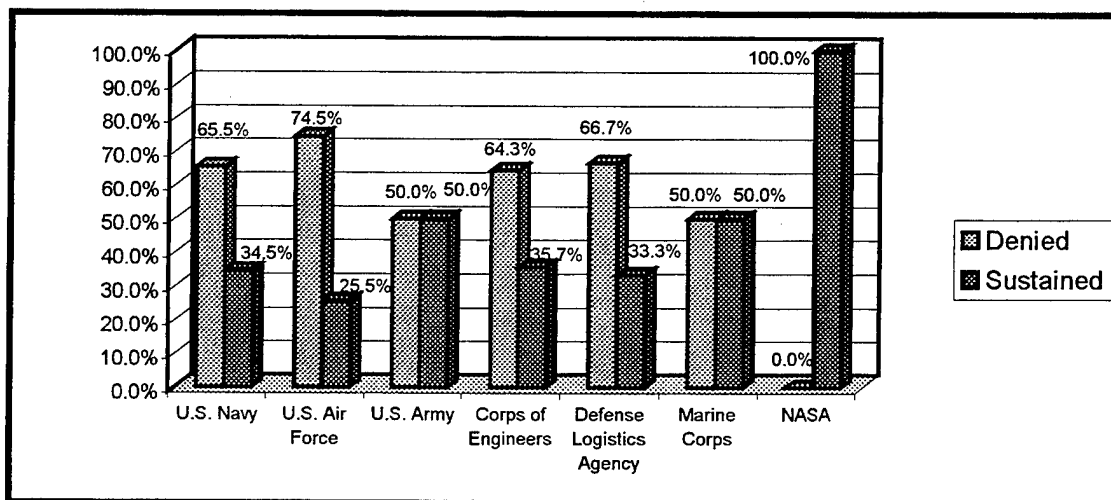


Figure 13 Percent of Denied/Sustained Decisions by DoD Agency

Source: Developed by the researcher

2. DoD Agency versus Type of Requirement

The data presented in Figure 14 presents the frequency of the types of requirements litigated for each type of service. These types of services were: 1) Supply, 2) Services, and 3) Construction contracts. Figure 15 displays the same data in

percentages. Both figures provide the total number of decisions the Board disposed of during the research timeframe by DoD agency.

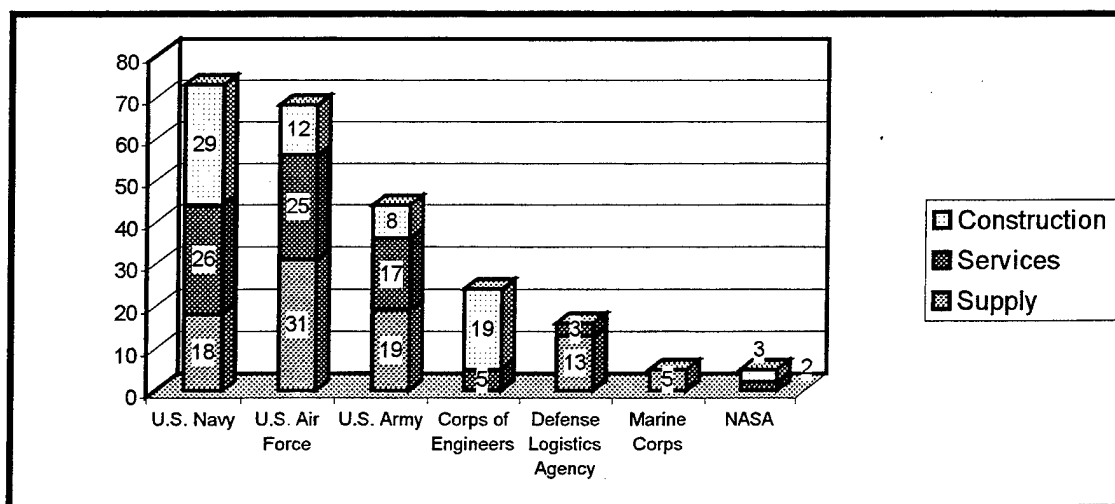


Figure 14 DoD Agency versus Type of Requirement
Source: Developed by the researcher

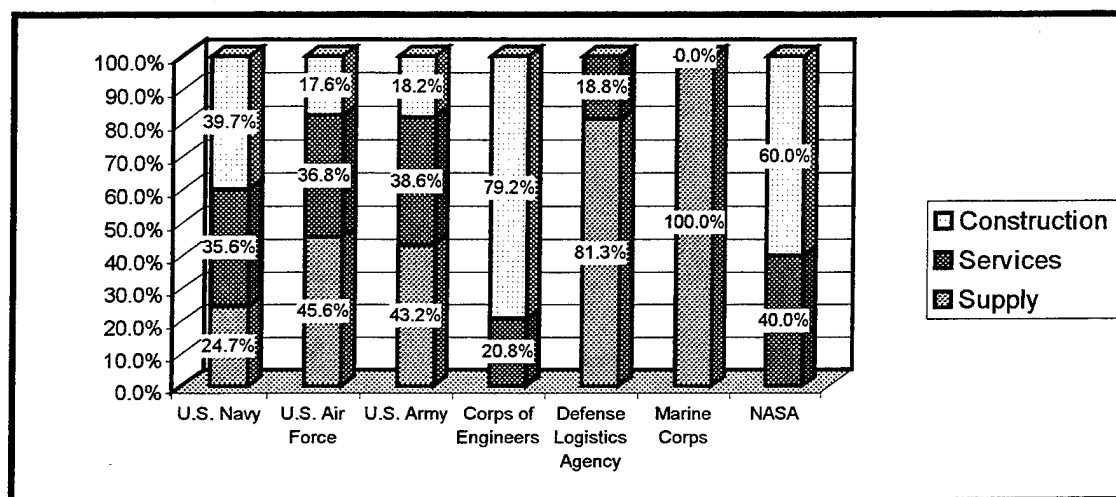


Figure 15 DoD Agency versus Type of Requirement
Source: Developed by the researcher

The number or percentage of litigated cases tended to follow the specialty of that particular DoD Agency; for example, the Corps of Engineers had a higher percentage of construction contracts litigated, while DLA had a higher percentage of supply contracts

litigated, and so on. The data suggest that the largest users of the ASBCA are the Army, Navy, and Air Force and that the type of services litigated are spread evenly. There appears to be no other trend.

3. Single versus Multiple Dispute Cases

Of the 289 appeals decided by the ASBCA 186, or 64.4% of all appeals cases, had only one root cause of dispute. Eighty-nine, or 30.8%, had two root causes for dispute, and 14, or 4.8% of all appeals cases, had three or more dispute root causes. Figure 16 below shows these findings.

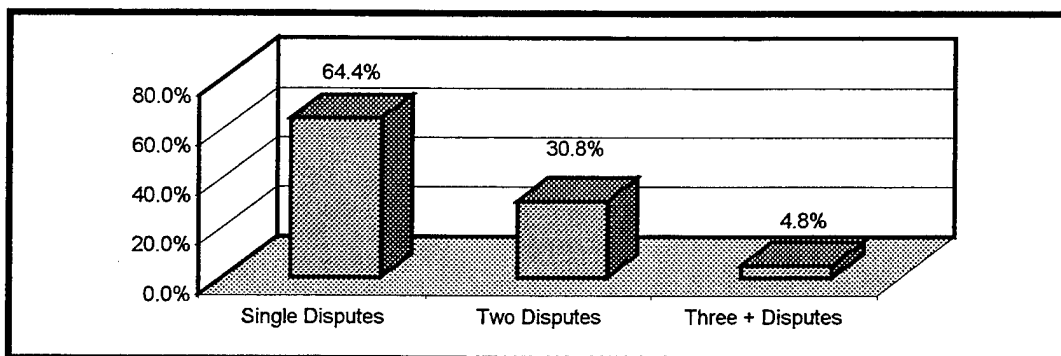


Figure 16 Single versus Multiple Dispute Appeals

Source: Developed by the researcher

The highest number of multiple-disputes originated from construction contract disputes, with 42 multi-dispute claims or 40.7% of the total multiple dispute cases. The balance of these cases were either supply, service or cases not specified in the decision. The dispute most likely to be found in combination with an additional dispute was Government changes to end-product design or specification. The data also suggest that construction contracts tend to be the most complex dispute cases, due to the tendency to have more than one dispute decided on a single appeal.

4. DoD Type of Service versus ASBCA Decision

Chapter III provided a basic breakdown of ASBCA decisions issued between January 1998 and June 1999. This subsection will briefly analyze the ASBCA decisions as they apply to the three different types of requirements, which are segregated by: 1) supply contracts, 2) service contracts, and 3) construction contracts.

The ASBCA may dispose of an appeals case by 1) “denying” the appeal in it’s entirety; 2) “sustaining” the appeal in favor of the appellant; 3) “dismissing” the appeal; 4) issuing a “split” decision in which part of an appeal is sustained and part is denied; or 5) denying the motion for summary judgment if there is an issue of material fact that must be decided before a decision can be issued. It is unclear how a dismissed claim fell out, how a summary judgment denial will finally be decided, or how to define the win or loss on a split decision. Therefore, for purposes of this analysis, these statistics will be omitted. Figure 17 displays the thesis data segregated by supply, service, and construction contracts:

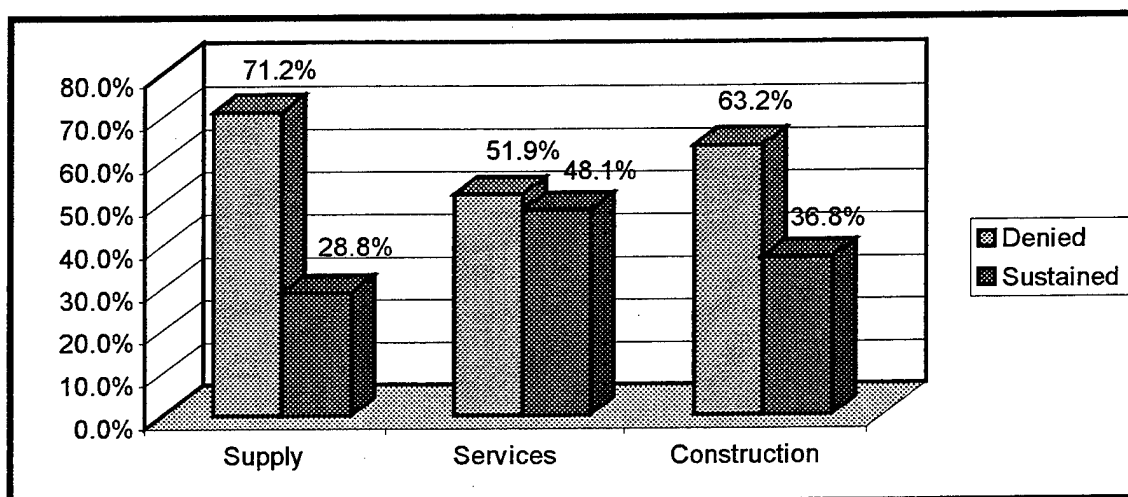


Figure 17 Type of Contract versus ASBCA Decision

Source: Developed by the researcher

The data indicate a fairly predictable trend of potential outcomes for the three different types of contracts. Knowing the percentage of appeals that are sustained in favor of the appellant (who is the contractor 97.9% of the time), the Contracting Officer can speculate his or her odds of winning an appeal based on the type of contract in question.

Litigated services contracts tend to have the most even split between denials and sustained decisions. The data show that 48.1% of all services contracts are resolved with a sustained decision in favoring of the contractor. The researcher noted a high number of weaknesses in two Government weakness categories for service contracts. Eight of the 24 (33%) sustained service contract appeals cited the CO's lack of familiarity with the contract as a Government weakness; seven of the 24 (29.2%) sustained service contract appeals cited Government disruptions or delays as a Government contracting weakness.

Supply and construction contracts tended to follow the 65% - 35% trend and will not be discussed further in this subsection.

5. Government versus Contractor Dispute Initiation

Only the contractor can challenge a COFD in the form of an appeal; however, both the Government and the contractor have the right to appeal a decision by a Board of Contract Appeals (or U.S. Court of Federal Claims). Only 2.1% of all appeals decided by the Board came from the Government. The other 97.9% were originated by the contractors, most of whom were dissatisfied with the COFD. While the Government won on appeal two of five times 40% and lost on appeal three times or 60%, the contractor won on appeal 63 times or 36.3% and lost on appeal 116 times or 63.7%. See Figure 18

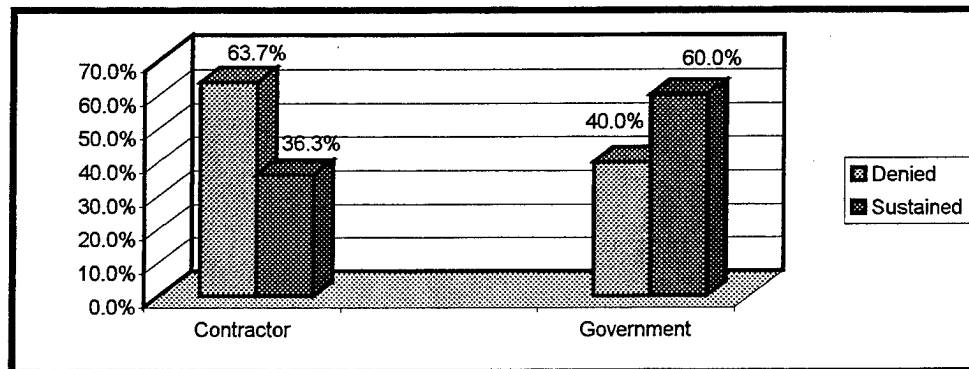


Figure 18 Government versus Contractor dispute initiation

Source: Developed by the researcher

Two possible reasons could explain this statistic. First, the Government tends to have a more developed system of “checks and balances” than do most contractors. Second, the Government has on-call legal counsel at its disposal. In addition, Contracting Officers must normally confer with their Head of Contracting Authority (HCA) and/or legal counsel prior to any dealing with the contractor during the appeals process.

Smaller contractors may tend to act more emotionally if they think they have been wronged [Ref. 18], thus leading to frivolous claims and appeals. In addition, most smaller firms do not have on-staff attorneys. Outside attorneys, who litigate as a means of earning profit, have no incentive to negotiate an agreement outside of litigation. [Ref. 19] The overwhelming win/loss record in favor of the Government suggests that the above observations probably carry considerable weight.

6. Small Business Administration (SBA) Appeals Record

The sometimes catastrophic nature of disputes regarding contracts backed by the Small Business Administration (SBA) was striking. In these cases, the contractor encountered an unusually high number of weaknesses. Indeed, 60% of all SBA contractors exhibited multiple contracting weaknesses, as opposed to only 19% by the

entire population of appeals analyzed. This seemed to indicate that the SBA abandoned the small business, letting it either sink or swim. However, further analysis proved this initial impression wrong. In fact, the SBA sustainment record is slightly better than the average. See Table 9 below:

	Denied / Percentage	Sustained / Percentage
All ASBCA decisions	118 / 64.1%	66 / 35.9%
SBA decisions	8 / 57.2%	6 / 42.8%
Non-SBA decisions	110 / 64.7%	60 / 35.3%

Table 9 SBA Appeals Record versus Total Appeals

Source: Developed by the researcher

Dismissed appeals, split decisions, and summary judgment denials are not included in the table.

The denied/sustained data indicate that small business contractors are just as capable of winning a sustained decision as the larger contractors are. In reading each case, ASBCA judges tended to be unsympathetic even towards the small business contractor therefore extinguishing the theory that the higher sustainment rate for small businesses is due to unfounded sympathy by the ASBCA. Another possible explanation for the higher-than-average sustainment rate for small business contractors is that three of the six sustained decisions, or 50%, exhibited multiple Government contracting weaknesses. These weaknesses included directed changes, lack of familiarity with the contract, lack of authority to withhold final payments, and arbitrary contracting practices. Finally, it is possible that many businesses intentionally stay small in order to be eligible for small business set-aside contracts. These businesses narrowly meet the small business minimum criteria, have years of experience in their industry and have significant

experience in dealing with Government contracts; all of which may also explain their slightly higher than average sustainment rate.

7. Reconsideration of Previous ASBCA Decisions

The highest denial rate indicated by the data was requests to reconsider previous ASBCA decisions. Dismissed appeals, split decisions, and summary judgment denials were excluded from the table due to the fact that these appeals have yet to be resolved.

It is at this stage in the appeals process that Government agencies are eligible to appeal a decision issued by a Board. The Government exercised this right six times, winning sustained decisions in three of those appeals, or 50%, as shown in subsection five above. Two were denied and one was a summary judgment denial due to a dispute over the material facts of the appeal. See Table 10 below:

	Denied / Percentage	Sustained / Percentage
All ASBCA appeals	118 / 64.1%	66 / 35.9%
Reconsideration appeals	33 / 84.6%	6 / 15.4%

Table 10 Reconsideration Appeals Record versus Total Appeals

Source: Developed by the researcher

The research data indicated that reversing a sustained decision is particularly difficult for both Government and the contractor. An analysis of the reconsideration cases and the database indicated that a lack of proof or evidence was the primary reason for a denial in 21 of the 33 decisions, or 63.6%. Further analysis and review of each case revealed that the judges were not given new and compelling evidence or were not given new legal theories with which to consider the case. The Board will not reverse its previous decision unless the appellant can produce irrefutable evidence. In a telephone interview, one of the current judges explained the level of evidence required. Generally, if the appellant can show solid evidence—e.g., an error in the computation of an award or

some other form of “black and white” evidence—the appeal will be reconsidered and the decision may be reversed. [Ref. 17]

C. ANALYSIS OF RECURRING REASONS FOR DISPUTE

The dispute categories listed below were extracted from all of the Board’s decisions issued between January 1998 and June 1999. Therefore, they represent current situations faced by Contracting Officers (CO) in the field. This section will analyze the top ten contract dispute reasons in depth, as shown in Table 11. An appeals case example for each of the ten most common contract dispute elements will be described to demonstrate each reason for dispute. The ten most frequent disputes accounted for almost 80% of the total contract disputes observed. A summary table (Table 14A and 14b) of the ten most frequent disputes, Government weaknesses, and contractor weaknesses will be provided at the end of this chapter along with a general summary analysis of the nature of all disputes reviewed.

	Categories of Contract Disputes	Freq.	% of elements	% of cases
1	Government changes to design or specifications or drawings	44	12.5%	15.2%
2	Government Termination for Default (T4D)	44	12.5%	15.2%
3	Contractor claim for Government delays	39	10.9%	13.5%
4	Government accelerations or constructive changes without equitable adjustment	32	8.9%	11.1%
5	Government Termination for Convenience (T4C)	27	7.7%	9.3%
6	Withholding or delay of payments or amount of equitable adjustment	23	6.6%	8.0%

Table 11 Reasons for Contract Disputes

Source: Developed by the researcher

7	Contractor fees incurred in successfully defending or winning appeals / claims against the Govt through the Equal Access to Justice Act (EAJA)	20	5.7%	6.9%
8	Differing site conditions	15	4.3%	5.5%
9	Contractor appeal of assessed Liquidated Damages (LD) collection(s)	15	4.3%	5.5%
10	Contractor appeal to Govt allegations of defective pricing	13	3.7%	4.5%
11	Government jurisdiction challenge	12	3.3%	4.2%
12	Government withholding information / unfair practices / arbitrary & capricious business practices or competition practices	12	3.3%	4.2%
13	Contractor inability to secure-material(s) for the contract	10	2.8%	3.5%
14	Contractor overhead cost challenges	10	2.8%	3.5%
15	Contractor timely appeal challenge	6	1.7%	2.1%
16	Cancellation of delivery orders or options years at Govt request	6	1.7%	2.1%
17	Contracting Officer (CO) failure to return Performance Bonds / Guarantees in a timely manner	6	1.7%	2.1%
18	Miscellaneous / unable to categorize	5	1.4%	1.7%
19	Wage rates / tax rates / union disputes	5	1.4%	1.7%
20	Poorly written solicitations	4	1.1%	1.4%
21	Contractor claims for royalties or lost profits from Value Engineering Change Proposals (VECP)	4	1.1%	1.4%
22	Appellant recognized as a legal entity	2	.6%	.7%
	Total Disputes Elements Identified by the researcher	357	100%	

Table 11 Reasons for Contract Disputes (Cont'd)

Source: Developed by the researcher

The analysis in this section focuses on the ten most frequent dispute categories identified in supply, service, and construction contract disputes:

- Government changes to design or specifications;

- Government Terminations for Default (T4D);
- Contractor claims for Government delays;
- Government accelerations or constructive changes;
- Government Termination for Convenience (T4C);
- Withholding or delay of payments or for the amount of equitable adjustment;
- Contractor fees incurred in successful defense of claims;
- Differing site conditions;
- Contractor appeals of assessed liquidated damages; and
- Contractor appeals to Government allegations of defective pricing.

The number of denied and sustained decisions versus the ten most commonly identified dispute categories are presented graphically in Figure 19.

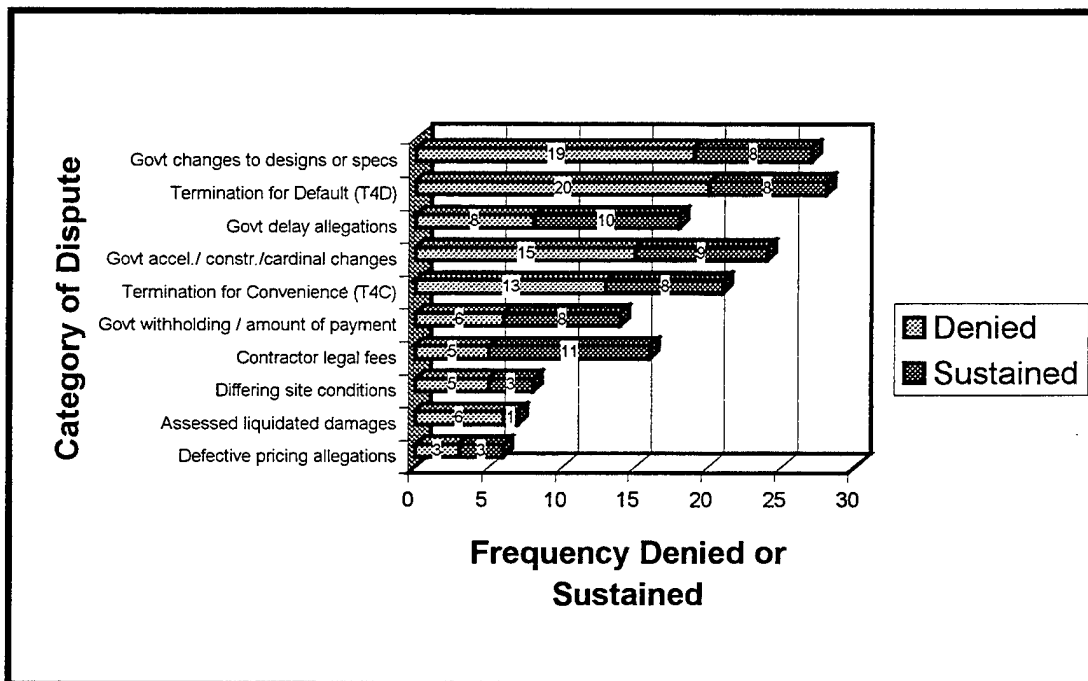


Figure 19 Government Denied or Sustained Decisions by Dispute Category
Source: Developed by the researcher

The percentage of denied or sustained decisions versus the ten most commonly identified dispute categories are presented graphically in Figure 20.

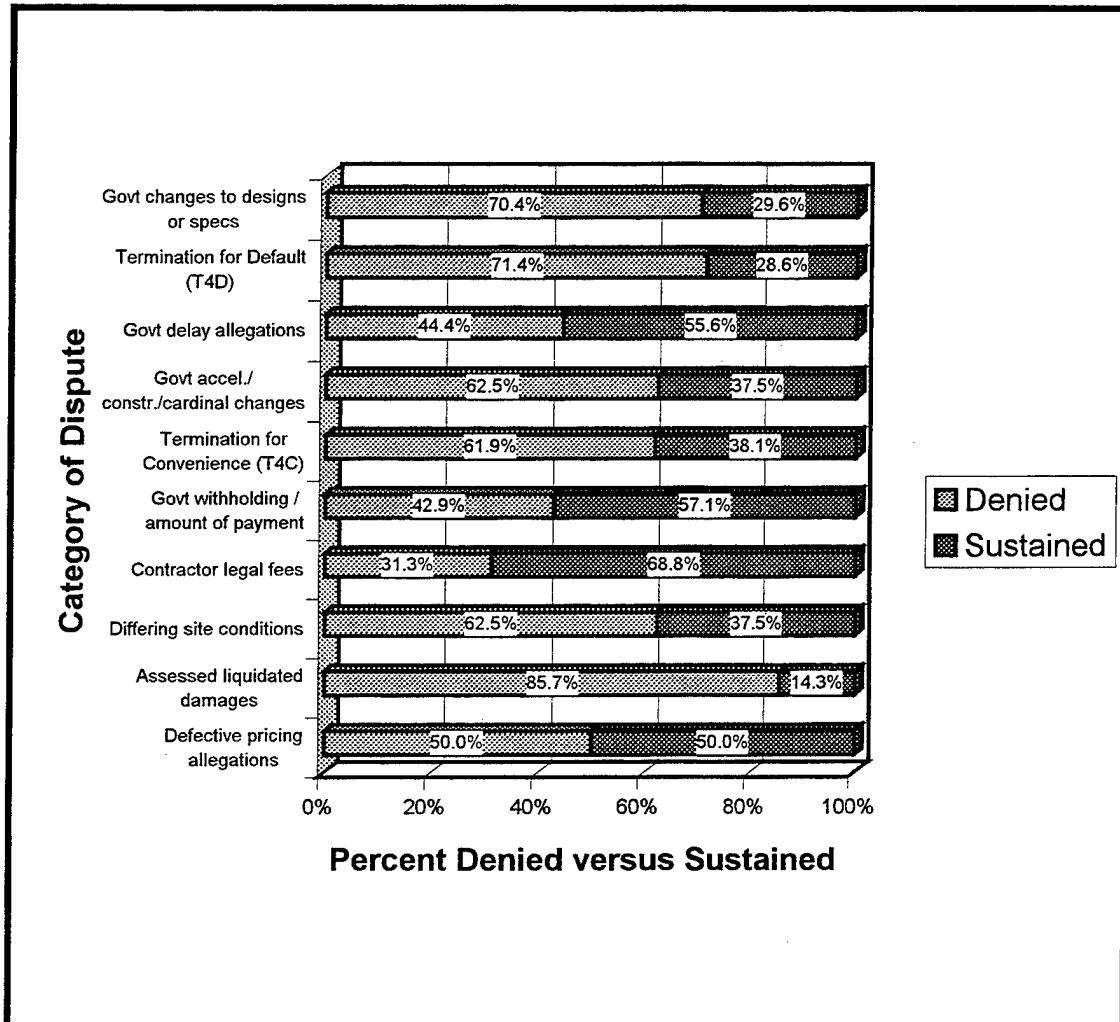


Figure 20 Government Denied or Sustained Percentages by Dispute Category

Source: Developed by the researcher

The percentage of denied or sustained decisions versus the ten most commonly identified dispute categories are presented in descending order graphically in Figure 21.

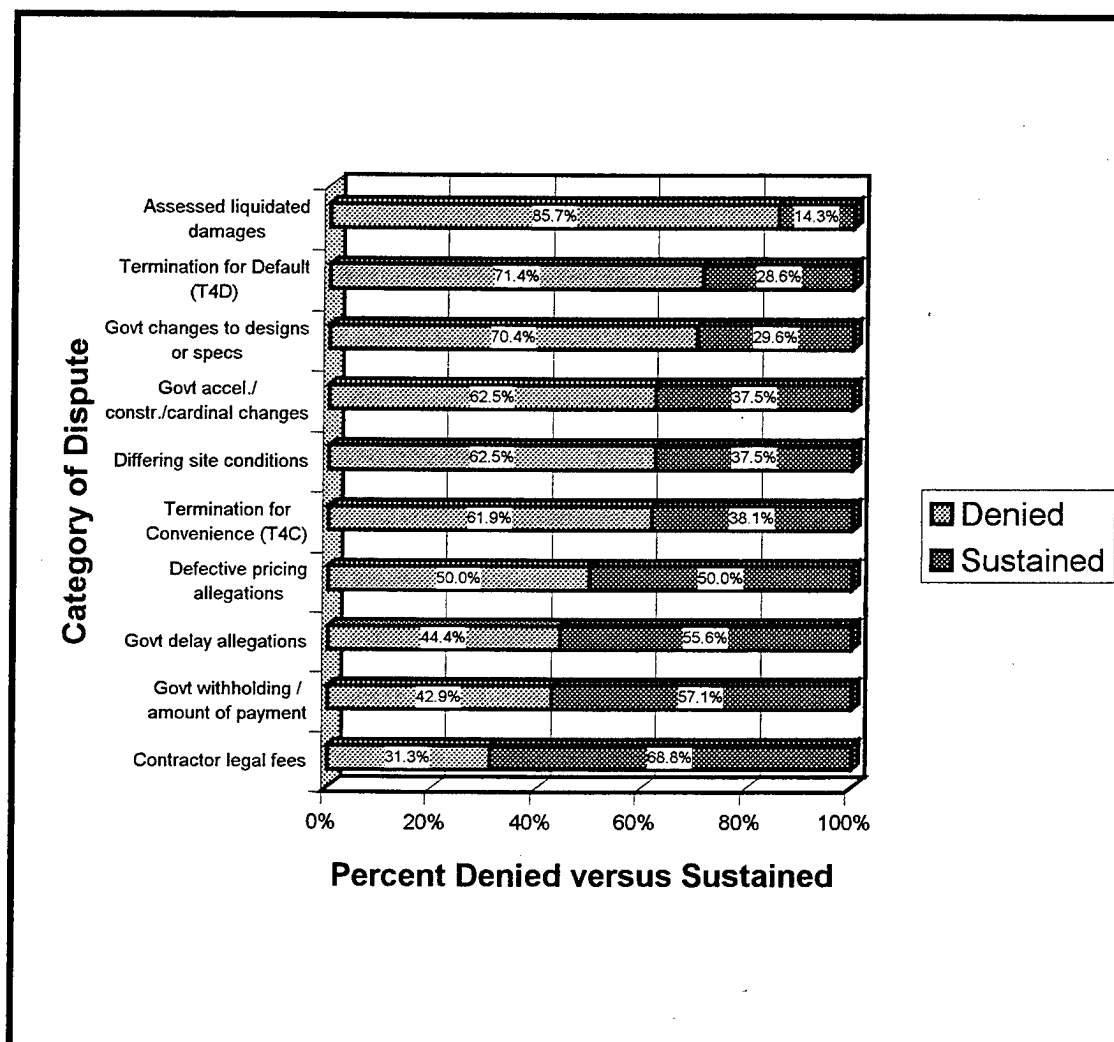


Figure 21 DoD Denied versus Sustained Decisions by Dispute Category (descending order)

Source: Developed by the researcher

1. Government Changes to Designs / Specifications / Drawings

The researcher identified 44 appeals cases in which the contractor submitted a claim to the CO because of Government changes to designs, contract specifications, or drawings. This represents 15.2% of the 289 cases researched. In this contract dispute category, 16 (36.4%) were for supply contracts, 17 (38.6%) were for service contracts, and 11 (25.0%) were for construction contracts. Further analysis of the data indicated that this particular Government contracting weakness contributed to 19 (43.2%) denied

decisions, eight (18.2%) sustained decisions, eight (18.2%) split decisions, and nine (20.4%) denials of decision by summary judgment. The U.S. Air Force had the most contract disputes in this area, with 15 of the 44 disputes or 34.1%, followed by the U.S. Navy with ten or 22.7%.

In the appeal *Smith of Galetton, Inc, ASBCA 50580*, the Defense Logistics Agency (DLA) contracted to procure 30,360 pairs of gloves per MILSPEC MIL-G-1057H. The CO imposed "additional testing" procedures to the existing contract in order to test for colorfastness without offering an equitable adjustment. In order to comply with this unplanned change in contract specifications, the contractor had to buy a more expensive type of material than the original contract had required. The COFD denied the contractor an equitable adjustment. A timely appeal was filed by the contractor to the Board (<90 days from date of COFD). The Board sustained the appeal in favor of the contractor for a total of \$111,164.07.

Effective administration of a contract depends heavily upon the management of events that may require the original contract to undergo changes. It is a rare contract that does not have some element changed during performance of the contract. Changes can be as minor as a change in paying office, which will not impact any cost or performance factors. Other changes such as a revised schedule or redesign of the deliverable can have a significant impact upon many parts of the contract, in addition to cost. [Ref. 3: pp.228-229] Changes are permitted to be initiated by the CO on a bilateral or unilateral basis in one or more of the following situations: 1) drawings, designs or specifications; 2) method of shipment or packing; 3) place of inspection, delivery or acceptance; 4) description of services to be performed; and 5) place of performance. This dispute category was found

primarily in supply and services contracts. The data indicate that the most frequent Government weakness in this dispute category is delays and disruptions, lack of timely CO actions, and defective Government furnished equipment (GFE), therefore, the research concludes that these Government weaknesses are the probable reasons why this dispute was litigated.

The data indicate that although Government intervention after the contract is signed is legal in accordance with FAR Part 52, this is one of the single largest problems for the contractor. Also, a hidden problem lies with the Government's inability to clearly define and describe the product or service required. The data indicate that the Government wins 70.4% of the disputes in this category therefore the CO is probably following the FAR when initiating contract changes.

The research has generally found that the CO's representative (COR) is not a problem in this area. The COR was identified in only two of 289 cases as contributing to the contract dispute. The rest of the disputes centered on either outside customer influences or the actions of the CO. It is paramount that the PCO or ACO continue be the single face to industry in all contract decisions if contract disputes are to be avoided.

2. Government Termination for Default (T4D)

This research identified 44 appeals in which the dispute category was a Termination for Default (T4D) decision on the part of the CO. This constitutes 15.2% of the total contract appeals between January 1998 and June 1999. In this contracting dispute category, 26 (59.1%) were supply contracts, eight (18.2%) were service contracts, and ten (22.7%) were construction contracts. Further analysis of the data indicated that this particular Government dispute was found in 20 (45.4%) denied decisions, eight

(18.2%) sustained decisions, seven (15.9%) dismissals, two (4.6%) split decisions, and 7 (15.9%) denial motions for summary judgment, which are still pending. The U.S. Air Force had the most observed disputes in this category, with 15 (34.1%) of the 44 disputes, followed by the U.S. Army with 12 (27.3%).

The data indicates that the primary cause of T4D disputes is the inability of the contractor to deliver the product or service on schedule. Failure of the product or service to meet contract specifications is the second largest reason for a T4D dispute.

A good example of a T4D is *B. R. Services ASBCA 47673*. B.R. Services was a small business contractor who committed multiple contract errors. The contract involved repairing an 800-square-foot roof on the American Embassy in Katmandu, Nepal. The CO had extended the contract several times in an effort to obtain the required repairs, and had developed a discrepancy list of all required work needed in order to close out the contract and make payment. The contractor, through the execution of the contract was proven guilty of violating customs laws; failing to use the sealant spelled out in the contract; employing unskilled labor; failing to complete the list of discrepancies; producing workmanship not to contract specifications; falling seriously behind schedule; and, finally, abandoning the contract after 75% of the work had been completed. All of these factors contributed to the CO's decision to terminate the contract for default. When the contractor appealed the CO's termination of the contract for default, the Board denied its appeal.

In order for the Board to uphold a T4D handed down by a COFD, the Government and, in particular, the CO has a high burden-of-proof requirement in order to sustain a T4D ruling. In accordance with FAR Part 49, the basis of a termination for

default depend on two legal rights of Government. First, it is the exercise of a basic legal right of the Government to terminate a contract, in whole or in part. Second, it has the contractual right to terminate, by reason of the contractors failure to perform its obligations under the contract. The regulations authorize a termination action for either actual or anticipatory failure. [Ref. 3: p. 274]

Careful review of the 44 T4D dispute cases indicate that the CO is likely to win a T4D appeal only after the CO has made several attempts to assist the contractor. This pattern of cooperation on the part of the CO generally includes extending the delivery schedule at least once, increasing the contract price for allowable costs incurred, or actively participating in the interpretation of contract requirements. If the CO can prove that he or she assisted the contractor in order to make the contractor successful, then the CO has satisfied the burden-of-proof requirement for a T4D decision. [Ref. 17] The data suggests that since the Government wins a T4D decision 71.4% of the time and loses 28.6% of the time, the Government, and in particular the CO are generally following established procedures and regulations.

3. Compensation for Government Delay(s)

In 39 appeals, a contractor filed a claim for alleged Government delays. This constitutes 13.8% of the total contract appeals between January 1998 and June 1999. In this contracting dispute category, 12 (30.7%) were supply contracts, seven (17.9%) were service contracts, and 20 (51.4%) were construction contracts. Further analysis of the data revealed that this particular Government dispute was found in eight (20.5%) denied decisions, ten (25.6%) sustained decisions, two (5.1%) dismissals, nine (23.2%) split decisions, and ten (25.6%) denied motions for summary judgment, and these cases are still

pending. The U.S. Navy had the most observed disputes in this category with 14 (35.9%) of the 39 disputes, followed by the U.S. Air Force with ten (25.6%) observed disputes in this area.

An example of Government delays can be found in *Industrial Steel, Inc., ASBCA 50754*. In this appeal, Industrial Steel, Inc. accused NASA of Government delays and disruption. The firm fixed price (FFP) contract was issued for the construction of two environmental control buildings for launch pads A and B at Kennedy Space Center, Florida. Contract price was set at \$468,238, and the contract guaranteed 100 days' access to launch pads A and B. However, the contractor experienced continuous delays due to inadequate access to the launch pads. Upon further investigation, launch pad Operations and Scheduling never received a clear description of the contract access requirements; therefore, shuttle launches, launch preps, and continuous sandblasting prohibited contractor access for prolonged periods. Also, the contractor had to leave equipment on-site, thus prohibiting concurrent work. Upon concluding the contract, the contractor submitted a claim for unabsorbed overhead. The Board sustained the appeal in favor of the contractor and increased the contract price from \$546,819 to \$1,015,057.

The collected data indicate that the most frequent causes of Government delays are: 1) directed changes and disruptions; 2) lack of timely CO action (reviews, modifications etc.); and 3) untimely COFDs. In almost every case, the Board ruled that the contractor had at least some concurrent delays; therefore the Board issued a sustained decision for an amount less than the initial claim.

An act of the Government that delays a contractor, does not automatically entitle the contractor to an excusable delay. It must be shown that the Government is some way

interfered with the contractor's prosecution of the contractual effort. [Ref. 3: p. 290] Even though a contractor can establish that an event was unforeseeable or occurred without its fault or negligence, the contractor must prove that it was actually delayed in the performance of the work. The data shows that the Government loses 55.6% of the disputes involving Government delays therefore that contractor is meeting this burden of proof. The fact that the Government was proven guilty of contract delays, on even a limited number of days, indicates that the Government agency was ill-prepared to support contractor efforts. Furthermore, proven delay by the Government agency indicates a lack of internal coordination. The data indicate that lack of expertise in quality assurance, lack of authority for acceptance of contractor work, and inability to coordinate repairs and maintenance during day-to-day operations also contributed to Government caused delays.

As stated earlier, Government delays reduce the contractor's efficiency, shed a bad light on the Government agency, and ultimately cost the U.S. taxpayer.

4. Constructive or Cardinal Changes/Accelerations by the Government without Equitable Adjustment

This research identified 32 appeals where the contractor filed a claim alleging constructive changes or accelerations. This constitutes 11.1% of the total contract appeals between January 1998 and June 1999. In this contracting dispute category, five (15.6%) were supply contracts, seven (21.9%) were service contracts, and 20 (62.5%) were construction contracts. Further analysis of the data revealed that this particular Government dispute was found in 15 (46.9%) denied decisions, nine (28.1%) sustained decisions, one (3.2%) dismissal, five (15.6%) split decisions, and two (6.2%) denied motions for summary judgment, and these cases are still pending. The U.S. Navy had the

most observed disputes in this category with 13 (40.6%) of the 32 disputes, followed by the U.S. Air Force with six (18.7%) observed disputes in this area.

The data indicated that the following reasons for disputes in this category occurred most frequently: 1) Government-directed changes, disruption, or delays; and 2) defective Government specifications or Government Furnished Equipment (GFE).

In the appeals case *Ellis-Don Construction, ASBCA 51029*, the Department of Health and Human Services issued an FFP contract for the construction of the Alaska Native Medical Center. The contractor alleged a constructive change, accusing the Government of requiring materials that exceeded the specifications outlined in the original contract. The appeal was sustained in favor of the contractor.

Constructive changes are defined as changes that the CO issues to a contract or that are within the scope of the contract but not in writing. Constructive changes can also be classified as orders issued by a COR or other Government representative who can reasonably be assumed to have authority. This type of authority is called "implied authority" and can be upheld in court as fund obligating and contract altering. Accelerations occur when the CO or other Government member with implied authority causes the contractor to perform at a faster rate than originally contracted. A cardinal change, another area where COs can get into trouble, has occurred when: 1) the scope of the contract has changed; 2) the fundamental use of the item or material has changed; 3) the quantity required has changed; or 4) the number of parts required to assemble or support has significantly changed. [Ref. 20]

The data indicate that the reason for disputes in this category are almost exclusively the fault of the Government representative supervising the contractor. When

more than one Government representative is issuing contract interpretations or approving contractor products and services, or if the Government representative is supervising the contractor in an arbitrary manner, the contractor will likely execute competing and often times conflicting instructions. This, ultimately leads to contractor confusion and a subsequent claim. COs must therefore exercise sound judgment when dealing with contractors where frequent contract modifications, are routine and insure the Government exercises the "single face to industry" policy. [Ref. 21]

5. Government Termination for Convenience (T4C)/Monetary Claim(s)

The researcher identified 27 appeals where the primary dispute element was a termination for convenience (T4C) decision by the CO. This constitutes 9.6% of the total contract appeals between January 1998 and June 1999. In this contracting dispute category, 14 (51.9%) were supply contracts, 11 (40.7%) were service contracts, and two (7.4%) were construction contracts. Further analysis of the data revealed that this particular Government dispute was found in 13 (48.1%) denied decisions, eight (29.6%) sustained decisions, one (3.8%) split decision, and five (18.5%) denied motions for summary judgment, and these cases are still pending. The U.S. Air Force had the most observed disputes in this category with ten (37.1%) of the 27 disputes, followed by the U.S. Navy with six (22.2%) observed disputes in this area.

Nearly all T4C cases involved either supply contracts or service contracts. The data indicated that the recurring cause is the Government's change in requirements thus causing a termination in order to save taxpayers dollars or if the contract was entered into in error as will be explained in the example. It is a widely known and "deeply ingrained" procurement policy that the Government retains the right to terminate a contract for

convenience when such contract no longer serves the needs of the Government. This right is also protected under the Christian Doctrine, which states that:

... an omitted but required clause is automatically incorporated by operation of law into an existing contract as if it had been there all along, although it really was not. [Ref. 20]

The appeal *EROS, Division of Resource Recoiling, ASBCA 49887* is an example of a case in which the Government was required to terminate a delivery order type contract for convenience. The contract, issued by the Defense Logistics Agency (DLA), required the contractor to disassemble and sell for salvage 100 B-52 airplanes. Shortly after the contract was signed, a contract audit revealed unfair competition practices. The head of contracting (an Army O-6) had neglected to solicit competitive bids in the Commerce Business Daily (CBD), electing instead to award the contract "sole source" without justification. Upon completion of the internal DLA audit, the CO was removed and the contract terminated for convenience. The contractor appealed the T4C decision in favor of continuing salvage operations. The appeal was denied and the contract terminated.

Although the Government is protected by the Christian Doctrine, it is also protected from being bound by the unlawful acts of its agents, *FCIC v. Merrill*. [Ref. 23] The Government has an obligation to the taxpayer for the faithful stewardship of public funds. The Government's ability to terminate contracts for goods and services it no longer needs, as is the case upon conclusion of major world conflicts, is just one of those tools. Although a contractor may be disappointed, the aim of the Government agency is to provide an equitable settlement upon receipt of a certified contractor claim for effort and material expended up to the date of the T4C. A T4C decision by the Board normally

makes the contractor eligible for a monetary claim, whereas a T4D normally negates the contractor's rights to a monetary claim/equitable adjustment.

6. Withholding or Delay of Payments or Amount of Equitable Adjustment

In 23 appeals cases, the contractor accused the Government of wrongfully withholding or delaying payments allegedly owed, or challenged the amount of an equitable adjustment. This dispute occurred in 7.6% of all appeals researched. In this contracting dispute category, three (13.0%) were supply contracts, 15 (65.2%) were service contracts, and five (21.8%) were construction contracts. Further analysis of the data revealed that this particular Government dispute was found in six (26.1%) denied decisions, eight (34.9%) sustained decisions, three (13.0%) dismissals, three (13.0%) split decisions, and three (13.0%) denied motions for summary judgment, and these cases are still pending. The U.S. Navy had the most observed disputes in this category with nine (39.0%) of the 23 disputes, followed by the U.S. Air Force with eight (34.8%) observed disputes in this area.

As an example, *Graham International, ASBCA 50434* was a four-month services contract issued by the U.S. Air Force for grounds maintenance which included the minor repair of an irrigation system. Total contract value was \$56,000. Upon concluding the contract, the CO withheld \$21,458 for failure to fully repair the irrigation system. During discovery and the subsequent hearing, the contractor successfully proved that the CO never provided a list to the contractor of items that the Government found deficient. Furthermore, the irrigation system was severely damaged in various areas, thus bringing up the issue of defective Government Furnished Equipment (GFE). The lack of a timely

discrepancy list represents potential arbitrary contracting practices. The Board sustained the appeal in favor of the contractor.

The data showed that, within DoD, this dispute occurred in 21 appeals cases, 17 of which were confined almost solely to service contracts, or 81%. The contractor wins 57.2% of the time in this category. The data indicate that the most recurrent Government weaknesses in this category are 1) arbitrary and capricious contracting practices, and 2) lack of authority to withhold payment. There were no significant recurring contractor weaknesses in this category. To be successful in pursuing a claim for equitable adjustment, the contractor must: 1) file a claim in a timely manner; 2) accurately document all changes and delays; and 3) choose the correct method of calculating the costs resulting from changes and delays. [Ref. 3: p. 234] The fact that the contractor has a better than 50% chance of winning indicates that the contractor knows when they have been wronged and are willing to litigate if necessary.

The researcher concludes, based on the higher-than-normal sustained rate and the recurring Government weaknesses noted, that COs and their organizations must exercise due caution when withholding payments to contractors or when the calculated amount of equitable adjustment is disputed. This caution is especially important in the area of contracting for services. This dispute category also suggests a severe communication disconnect has occurred between the contractor and the CO regarding what is a fair and reasonable interpretation of contract requirements. Also, this dispute category suggests that training within the Government buying organization may be suspect. The CO must insure that proper training is conducted at all levels of the buying organization in order to fairly, equitably, and legally manage contract claims.

7. Contractor's Fees Incurred in Successfully Defending/Winning an Appeal Against the Government

This research identified 20 appeals where the primary dispute was a claim for fees and expenses incurred by a contractor in successfully defending or winning an appeal against the Government. This constitutes 6.9% of the total contract appeals between January 1998 and June 1999, all with DoD. In this observed contracting dispute category, one (5.0%) was a supply contract, five (25.0%) were service contracts, four (20.0%) were construction contract appeals, and ten (50.0%) were not specified in the case description. Further analysis of the data revealed that this particular Government dispute was found in five (25.5%) denied decisions, 11 (55.0%) sustained decisions, and four (20.0%) dismissals. The U.S. Navy had the most observed disputes in this category with eight (40.0%) of the 20 disputes, followed by the U.S. Air Force with four (20.0%) observed disputes in this area.

Appellants are authorized under the Equal Access to Justice Act (EAJA) to recoup attorney fees, expert witness expenses, and other allowable costs associated with a successful appeal. EAJA appeals are almost always sustained in favor of the contractor, but for a smaller amount than requested. For example, attorney fees are currently capped at \$75/hr. Contractors must provide the Board with proof of the actual number of hours the attorney, legal assistants, clerks, etc. spent on the appeal. During the 18 months of Board decisions analyzed in this thesis, 118 appeals were denied and 66 appeals were sustained. Only 20 contractors of the 66 whose appeals were sustained submitted claims for attorney's fees and expenses under the EAJA. The researcher finds only one possible explanation for this low rate of reimbursement requests. For most appeals, the appellant

(contractor) may have relied on the record (facts) to win his/her appeal because the claim was not large enough to justify use of legal counsel. The appellant has no more than 30 days from receipt of a sustained decision to submit a claim under the EAJA. After 30 days, the offer expires, and the Board loses jurisdiction to decide the appeal therefore the Board is forced to dismiss the appeal.

8. Differing Site Conditions

The researcher identified 15 appeals where the primary dispute element was differing site conditions. This constitutes 5.5% of the total contract appeals between January 1998 and June 1999. In this observed contracting dispute category, there were no supply contracts, three (20.0%) service contracts, and 12 (80.0%) construction contracts. Further analysis of the data revealed that this particular Government dispute was found in five (33.3%) denied decisions, three (20.0%) sustained decisions, five (33.3%) split decisions, and two (13.4%) denied motions for summary judgment, and these cases are still pending. The U.S. Navy and the U.S. Air Force shared the highest number of observed disputes in this category, each with four (26.6%) of the 15 disputes in this area.

The data show that, within DoD, this dispute occurred in 11 appeals cases, eight or 73% were construction contracts. The recurring Government weaknesses in this category were 1) Government changes, disruptions, and delays, and 2) untimely COFDs. The recurring contractor weaknesses were: 1) lack of evidence to prove that the differing site conditions warranted an equitable adjustment; 2) failure to meet schedules, and 3) poorly estimated proposals due to a poor or no site survey.

Differing site conditions were almost exclusively caused by acts of nature and occurred between the site survey and the notice to proceed (NTP). Typically, differing site conditions involve eroded soil requiring extra fill, contaminated soil conditions, or some of other form of material deterioration.

In the appeal of *Earth Tech Industries, Ltd., ASBCA 46450*, the U.S. Air Force issued an FFP contract for \$849,343 to add a concrete pad to runway 08/26 for F-111 aircraft. The contractor in this contract was immediately confronted by a host of problems, including: 1) the closure of a nearby gravel quarry; 2) repair of newly identified runway cracks (differing site condition); 3) additional labor required to meet schedule deadlines; and 4) extra fill requirements (differing site condition). The Board issued a split decision sustaining entitlement for the repair of pavement cracks in the adjacent runway and for extra fill requirements. The Board denied entitlement to the contractor's claim for additional labor and for additional expenses caused by using a more distant gravel quarry to satisfy concrete and fill requirements.

After analyzing the above case, as well as the other identified cases within this category, it appears that contractor claims involving differing site conditions are normally preventable. The key to preventing such claims lies in: 1) conducting a thorough site survey with a Government representative knowledgeable of the contract requirements; 2) insuring that the bidders actually conduct a site survey; and 3) conducting a pre-award conference to answer contractor questions. In one of the other appeals the researcher reviewed, the contractor claimed differing site conditions, but had never conducted a site survey.

In all the appeals analyzed, a thorough site survey would have identified all patent defects in the contract specifications. Although latent defects are more difficult to identify, many can probably be identified as well by an experienced contractor. The Government agency must research the site for such problems as underground piping, telephone lines, and cabling. Digging and access permits may also be required in order to avoid Government-caused delays. In general, attention to detail by both Government and contractor representatives can prevent future claims for differing site conditions. Interestingly, only 15 of the 83 construction contracts appealed, or 18%, claimed differing site conditions as the reason for the dispute. This indicates that this area of contract dispute is not a significant problem, and can be reduced further if both parties pay closer attention to detail.

9. Contractor Appeal of Assessed Liquidated Damages

There were 15 appeals where the primary dispute was a contractor's appeal of assessed liquidated damage (LD) collections by the CO. This constitutes 5.5% of the total contract appeals between January 1998 and June 1999. In this contracting dispute category, one (6.7%) was a supply contract, four (26.6%) were service contracts, and ten (66.7%) were construction contracts. Further analysis of the data revealed that this particular Government dispute was found in six (44.0%) denied decisions, one (6.7%) sustained decision, one (6.7%) dismissal, three (20.0%) split decisions, and four (26.6%) denied motions for summary judgment, and these cases are still pending. The U.S. Navy, Corps of Engineers, and U.S. Air Force each had four (26.6%) observed disputes in this category.

In the appeal of *Technocratia*, ASBCA 46567, a U.S. Navy FFP contract was issued for the electrical upgrade of Naval Support Activity (NSA), Souda Bay, Greece for \$343,730. The contractor fell behind schedule. The CO issued three contract modifications for schedule extensions totaling 70 days. The contract was eventually completed 183 days after the last extension. Per the liquidated damages clause, the CO assessed the contractor liquidated damages at a rate of \$100/day, for a total of \$18,300. The contractor's appeal was denied in its entirety.

Within DoD alone, 14 contractor appeals were submitted for assessed liquidated damages. The Government wins a denied decision in this category 85% of the time. Based on the larger number of denied versus sustained decisions, this dispute category is primarily a weakness of the contractor and is seen almost exclusively in service and construction contracts. The researcher found no supply contract appeals for liquidated damages. The data indicate that most recurrent contractor weaknesses were 1) failure to meet delivery schedules, and 2) lack of evidence to disprove the Government's allegation. The one sustained decision in favor of the contractor identified the CO's lack of familiarity with the contract and confusion with contract terms as the identified Government weaknesses.

A liquidated damages clause is normally written into all contracts in which a service or construction project is anticipated by a specific date or time. The clause is a mechanism for protecting the Government by providing an incentive to the contractor to complete the contract on time. Liquidated damages are not a penalty, but rather a means for the Government to recoup anticipated or actual expenses associated with non-availability of the required material, site or service. As stated earlier, the most frequent

contractor weakness identified by the data is the contractor's failure to stay on schedule or meet contract deadlines. What is not clear from the data is how effective the threat of invoking the LD clause is in deterring the contractor from falling behind schedule, however, the researcher's experience with LD clauses in construction contracts suggests that contractors earnestly seek to avoid liquidated damages at almost any cost. In reviewing the cases outlined in this study and working with and around contractors in general, the lessons learned can be segregated down to two recurring themes. First, the contractor wants to generate superior performance and a high quality product from his or her firm. Second, the contractor is concerned about generating profit. Assessing liquidated damages defeats both goals. If the Contracting Officer is clear in his or her expectations in terms of contract performance, product specification, etc., the contractor will generally perform as required in the contract. As the research clearly indicates, Government changes to designs and specifications causes ambiguity and confusion. A well planned procurement with a clear definition of the end product will potentially pay huge dividends in terms of contractor performance and thereby reducing the number of claims originating from liquidated damage assessments.

10. Contractor Defective Pricing

The researcher identified 13 appeals where the primary dispute was the Government seeking recovery for defective pricing, with a subsequent contractor appeal. This constitutes 4.5% of the total contract appeals between January 1998 and June 1999, all within DoD. In this contracting dispute category, nine (69.2%) were supply contracts, four (30.8%) were service contracts, and there were no construction contracts. Further analysis of the data revealed that this particular Government dispute was found in three

(23.1%) denied decisions, three (23.1%) sustained decisions, one (7.7%) split decision, and six (46.1%) denied motions for summary judgment, and these cases are still pending. The U.S. Army had the most observed disputes in this category with six (46.2%) of the 13 disputes, followed by the U.S. Air Force with five (30.8%) observed disputes in this area.

Of the cases decided, the data indicate that the most recurrent Government contracting weaknesses were: 1) inadequate contractor monitoring; and 2) lack of CO familiarity with the contract. The most recurrent contractor weaknesses included: 1) poor contractor judgment, and 2) poorly estimated proposals.

Defective pricing involves any contracting action subject to the Truth and Negotiation Act (TINA) where the negotiated contract price, (other than sealed bidding procedures) including profit or fee, was significantly increased for the following reasons: 1) the contractor or a subcontractor furnished the Government with cost or pricing data that were not complete, accurate, or current as certified in the contractor's Certificate of Current Cost or Pricing Data; or 2) a subcontractor furnished the contractor with cost or pricing data that were not complete, accurate, and current as certified in the contractor's Certificate of Current Cost or Pricing Data. [Ref. 22: p. 4-3]

An example of contractor defective pricing can be found in the appeal of *McDonnell Douglas Helicopter Systems, ASBCA 50447,50448,50449*. The U.S. Army awarded an FFP Basic Ordering Agreement (BOA) contract to purchase AH-64 Apache spare parts and related materials for \$5,585,070. All contracts with total values above \$500,000 are subject to TINA in accordance with Federal Acquisition Regulation (FAR) Part 15. Under TINA, several of the aircraft spares were defectively priced. It was proven that the contractor failed to provide complete and accurate cost/pricing data for

several of the aircraft spares. As a result, the CO filed a claim for \$840,022 plus interest. The Board denied a motion to decide the appeal via summary judgment in favor of a full hearing. The appeal is currently pending a hearing and final Board decision.

The data suggest that, although the number of defective pricing appeals represented only 4.5% of the total appeals decided by the Board between January 1998 and June 1999, the potential effect on the defense budget and, ultimately, the taxpayer is just as detrimental as any of the above-listed dispute elements. The data also indicates that proper pricing and negotiations with firms supplying high-dollar equipment spares is crucial and that proper monitoring of contract administration is also equally vital.

D. ANALYSIS OF OBSERVED GOVERNMENT WEAKNESSES

Through an analysis of 289 litigated supply, service, and construction cases, this research identified several potential weaknesses in Government, and particularly DoD, contracting practices. These weaknesses have been categorized into general groups and are listed by frequency of occurrence in Table 12. The reader should note that more than one weakness may relate to a single case and that not all cases had an identifiable Government weakness.

	Observed Weaknesses in Government Contracting Appeals / Practices	Freq.	Percent of Cases
1	Government disruptions or delays or constructive changes	48	16.6%
2	CO not familiar with contract	31	10.7%
3	Lack of timely CO action	22	7.6%

Table 12 Observed Weaknesses in Government Contracting Practices

Source: Developed by the researcher

4	Untimely COFD or failure to issue a COFD	22	7.6%
5	Defective GFP/GFE or specifications	13	4.5%
6	Lack of evidence or proof in counterclaims	13	4.5%
7	Lack of monitoring / excessive monitoring by Govt representatives	12	4.1%
8	Arbitrary & capricious contracting practices	11	3.8%
9	Inadequate past performance checks	11	3.8%
10	Lack of authority to hold/withhold payments or entitlements:	11	3.8%
11	Inadequate market research	9	3.1%
12	Honesty & integrity issues	5	1.7%
--	Total observed Government contracting weaknesses	208	

Table 12 Observed Weaknesses in Government Contracting Practices (Cont'd)

Source: Developed by the researcher

The analysis in this section focuses on the following six most frequently observed Government contracting weaknesses:

- Government disruptions or delays or constructive changes;
- CO unfamiliar with contract;
- Lack of timely CO action;
- Untimely COFD or failure to issue a COFD;
- Defective GFP/GFE or specifications; and
- Lack of evidence or proof in counterclaims.

Figure 22 shows the frequency with which these six most commonly identified weaknesses occurred.

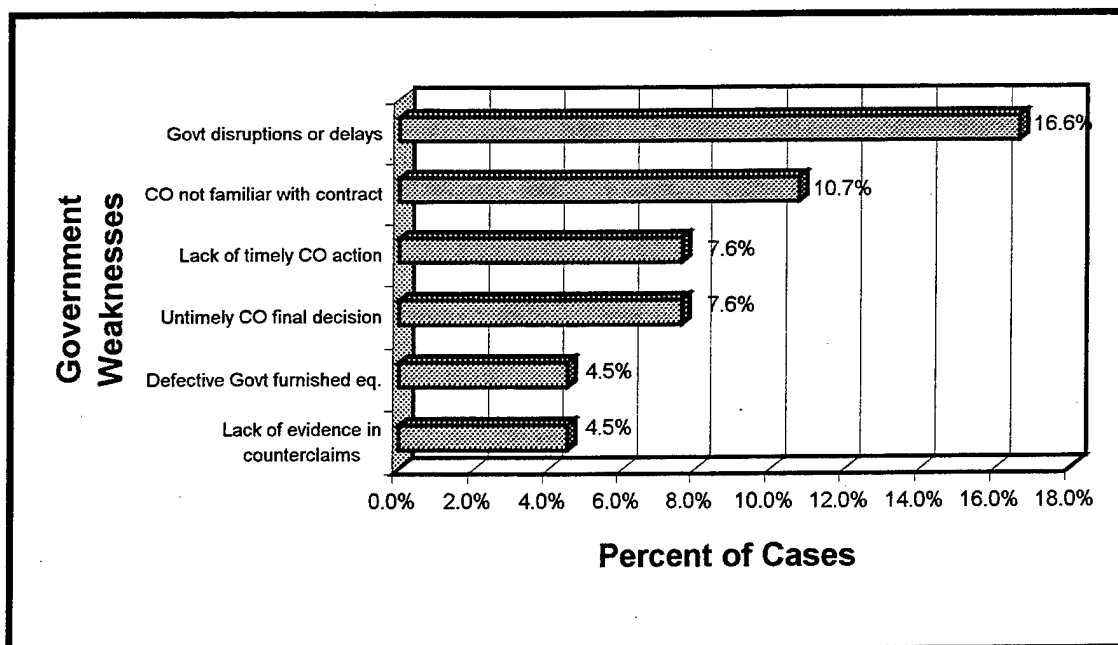


Figure 22 Observed Weaknesses in Government Contracting Practices
Source: Developed by the researcher

1. Government Disruptions or Delays or Constructive Changes

This research identified 48 disputes, or 16.6% of all ASBCA appeals between January 1998 and June 1999, in which Government disruptions, delays or constructive changes directly contributed to a contractor filing a claim against the Government. Of the 48 appeals, six (12.5%) were denied, 19 (39.5%) were sustained, nine (19%) were split decisions, 1 (2%) was dismissed, and 13 (27%) were denied summary judgment and have yet to receive a Board decision. Further analysis indicates that the contract dispute with the highest number of observed weaknesses (21) in this category was a “contractor claim for Government delay.”

An example of an appeal decision in which Government disruptions and delays were evident was *C.T. Builders, ASBCA 51615*. The U.S. Air Force signed a contract with C.T. Builders for the renovation of residential housing units, 49 of which had leaky

basements. The dispute was over an assessment of liquidated damages and for additional costs incurred while repairing unit number 648. A Government representative other than the CO changed the design specifications for repairing unit 648, thus causing an implied warranty situation. In addition, the CO placed the job on hold from 8 April 1996 to 20 September 1996 (165 days) while the CO attempted to find another solution. Also, someone other than the CO made a separate agreement with C.T. Builders concerning liquidated damages (LDs) to which the contractor had agreed. The implied warranty problem, coupled with the 165-day Government delay, was directly responsible for the sustained decision in favoring the contractor.

Government directed changes are the most common weakness in Government contracting procedures. Although only two of the 289 appeals involved "renegade" CORs, the CO can be influenced by a host of personnel. The Government can be bound by agents other than the CO as long as these agents can lead any normal person to regard them as having the capacity to act in that manner, *George White Construction v. U.S.* [Ref. 23: p. 45]. The CO must be the single face to industry and the single decision point if integrity in the acquisition process is to be achieved. [Ref. 21] DoD operates at a relatively high tempo; therefore, well-meaning, tenacious personnel with a less than 100% grasp of the contracting process can often do more harm than good. It is paramount that the CO stay engaged in the contract so that others close to the procurement are not tempted to act inappropriately to accelerate contract performance.

2. Contracting Officer Not Familiar With the Contract

In 31 of the 289 contract disputes, or 16.6%, it was evident that the CO was confused over a contract term or condition. The CO's confusion often led the contractor

to misunderstand what was legally required under the terms of the contract. Of these observed Government weaknesses, five (16.1%) were for supply contracts, 14 (45.2%) were for service contracts, and 12 (38.7%) were for construction contracts. Further analysis of the data found this particular Government weakness in three (9.7%) denied decisions, 17 (58.1%) sustained decisions, one (3.2%) dismissal, two (6.4%) split decisions, and seven (22.6%) denials of decision by summary judgment. The U.S. Navy had the highest number of contract weaknesses in this area, with 12 of the 31 weaknesses or 38.7%.

Cortez Service Corp. ASBCA 51740 illustrates this type of Government weakness. NASA contracted with Cortez Service Corp. for security guard services. A subsequent subcontract was let between Cortez and Rhodes Service Co. for the actual security guards. Rhodes belonged to the International Union of United Plant Guard Workers of America (UPGWA). During the FY 97 Government-wide shutdown, all but the most vital of Government functions were shut down. The contract called for premium pay during a specified group of holidays and other contingencies for security services. The CO was unaware of this contract clause or that a Government-wide shutdown clearly fit into one of these categories. The issue therefore was whether premium pay was warranted. Both parties agreed to attempt Alternative Dispute Resolution (ADR) services offered by the Board, using Binding Arbitration but with no effect. The Board then decided the appeal in favor of Cortez and its subcontractor, Rhodes Service Co.

This case also demonstrates privity of contract. Under privity of contract, a dissatisfied subcontractor can not sue the Government directly. Privity is Government to prime contractor, and prime contractor to sub contractor, as established in *Merritt v. U.S.*

[Ref 23: p. 285] Therefore, the prime must appeal the COFD on behalf of the sub. There are probably several reasons for CO lack of familiarity with contract clauses, terms or language. First, Contracting Officers generally handle a high volume of contracting actions, most of which are small purchases. Because the CO and his staff—often reduced due to Government cutbacks—are potentially overworked, a contract error can result. Second, the level of training of the CO may be questionable. The Cortez Service Corp. contract was a CPAF contract, which may not be a contract vehicle with which the CO or the organization is familiar with therefore contributing to the ambiguity and confusion. Dealing with unions, union rules, union pay rates may also be an area that the CO has little experience. It is incumbent that the CO become familiar with all rules and regulations or have access to experienced legal counsel. FAR Part 9 gives the CO considerable unreviewable authority to make final decisions. Unfortunately, this increases the CO's risk of crossing jurisdictional boundaries in areas such as labor laws, tax laws, environmental laws etc. For these reasons, the CO must consult with legal counsel and the Head of Contracting Authority (HCA) when cross-jurisdictional boundary questions arise and when unfamiliar contract requirements are faced.

3. Lack of Timely Contracting Officer Action

The data showed that 22 appeals, or 7.6% of all appeals analyzed, involved a lack of timely CO action, primarily in reviewing and approving contract modifications. Of these observed Government weaknesses, three (13.61%) were for supply contracts, 12 (54.5%) were for service contracts, and seven (31.9%) were for construction contracts. Further analysis of the data indicated that this particular Government contracting weakness contributed to nine (40.9%) denied decisions, three (13.6%) sustained decisions,

two (9.1%) dismissals, four (18.2%) split decisions, and four (18.2%) denials of decision by summary judgment. The U.S. Navy again had the highest number of contract weaknesses with eight, or 36.4%, followed by the U.S. Air Force with six, or 27.8%.

Atlantic Drydock, ASBCA 42679 provides a clear example of the Government's failure to issue change orders in a timely fashion. An FFP service contract was awarded to Atlantic Drydock to overhaul the machinery spaces in USS Sim. During the overhaul, additional repairs were required. According to a change clause in the contract, the contractor claimed cumulative disruption due to the large number of additional repairs requested by the U.S. Navy. The Board sustained the appeal in favor of Atlantic Drydock. The inability of the CO to issue timely change orders to the contract significantly contributed to the sustained decision.

In accordance with FAR Part 43, only Contracting Officers, acting within the scope of their authority, are empowered to execute modifications on behalf of the Government. Government personnel other than Contracting Officers, are not authorized to execute modifications. Additionally, Contracting Officers follow the procedures of FAR Part 43, *Contract Modifications*, in their issuance and processing of unilateral change orders. Contractors, however, are required to submit an equitable adjustment proposal within 30 days after receipt of a Contracting Officer's written order. The actual cost/impact proposal must be submitted within a reasonable period of time. [Ref. 3: pp. 229-231]

If the CO is untimely in the issuance of change order modifications, the entire acquisition process is delayed. The data indicate that untimely CO actions were seen primarily in disputes alleging Government delays and disputes involving terminations of

contracts for convenience (T4C). Untimely action was seen, in the cases analyzed, to have a detrimental effect on contractor efficiency and contributed significantly to contractor frustration. This frustration was evidenced by the number of premature appeals dismissed by the Board. The CO must take inputs from only one point-of-contact when it is unfeasible for the CO to interface directly with the contractor point-of-contact. Having only one input for requested modifications will insure that the CO has a clear understanding of required contracting actions.

4. Untimely Contracting Officer's Final Decision

Untimely Contracting Officer's final decision's (COFD) appeared in 22 of the 289 appeals, or 7.6% of the time. Of these observed Government weaknesses, one (4.5%) was a supply contract, ten (45.5%) were for service contracts, and ten (45.5%) were for construction contracts, and one (4.5%) was not specified. Further analysis of the data indicated that this particular Government contracting weakness contributed to four (18.2%) denied decisions, eight (36.4%) sustained decisions, three (13.6%) dismissals, three (13.6%) split decisions, and four (18.2%) denials of decision by summary judgment. The U.S. Navy and U.S. Air Force both had the highest number of contract weaknesses with six each, or 54.5%.

An example is *Hitt Contracting, Inc. ASBCA 51594*. The U.S. Navy issued this contract for housing repairs at the Naval Surface Warfare Center, Indian Head, MD. Hitt was directed to perform repairs outside the scope of work. Hitt submitted a claim for equitable adjustment, but the CO continually delayed the COFD. The contractor, after a reasonable period had passed, appealed directly to the Board. The Board denied the claim, stating that the CO must deny the claim in a formal COFD before the Board can

gain jurisdiction to hear the appeal. Therefore, the Board concluded the appeal was premature.

When the CO fails to issue a final decision as required under the Contract Disputes Act of 1978, the FAR, and the Disputes Clause, the contractor can easily interpret this inaction by the CO as a "de-facto" denial of the contractor's claim. Once the claim is "denied," the contractor has the right to appeal the denial to a Board of Contract Appeals or to the U.S. Court of Federal Claims. [Ref. 16: p. 89]

The lack of a timely COFD wastes the contractor's time and resources. If the eventual appeal is sustained in favor of the contractor, the Government will likely be required to pay a contractor's additional expenses incurred during the delay. Ten claims, or 3.5% of the entire range of claims, involved contractors' claims for unabsorbed overhead expenses incurred during Government delays. Under the Eachley formula, if contractors can prove that they were unable to secure work for their capital during the delay by the Government, then they will prevail in their claim for unabsorbed overhead costs and expenses. An untimely COFD also keeps contractors frustrated and misinformed. If COs can explain their decisions in a timely manner, the contractor can adjust their methods of executing the contract. This will more likely lead to a negotiated settlement outside the BCAs, thus improving the efficiency of the contracting process.

5. Defective Government Furnished Equipment (GFE)/Specifications

Defective GFE, Property, and Specifications contributed to 13 of the 289 appeals, or 4.5% of all appeals. In this observed Government contracting weakness, six (46.2%) were for supply contracts, two (15.4%) were for service contracts, and five (38.4%) were for construction contracts. Further analysis of the data indicated that this particular

Government contracting weakness contributed to three (23.1%) denied decisions, five (38.4%) sustained decisions, one (7.7%) dismissal, one (7.7%) split decision, and three (23.1%) denials of decision by summary judgment. The U.S. Air Force had the most observed cases in this area with six of the 13 appeals, or 46.2%, followed by the U.S. Army with three appeals, or 23.1%.

In the case *Essex Electro Engineers, Inc., ASBCA 49915*, the U.S. Marine Corps contracted for the delivery of lighting systems. During the contract, the contractor alleged that the Government agency directed revisions, supplied defective technical data, caused delays and disruptions, and supplied defective and late GFE. The Board denied all but the allegation of defective GFE, which was sustained in a split decision. Both the Government and the contractor have a responsibility regarding the proper care and handling of all forms of Government property. A Government agency has an obligation to support the contractor with the requisite property, equipment, or specifications spelled out in a contract. This carries the same weight with the Board as the contractor failing to deliver the product on schedule. Contractors may sue the Government for breach of contract. Normally, the burden of proof shifts to the Government once a contractor presents the necessary evidence for a breach of contract claim. The following three elements are necessary to support such a claim: 1) the Government breached the contract; 2) the contractor suffered specific damages; and 3) the damages were the result of the breach. [Ref. 3: p. 276]

Specifications are more difficult to judge, because they carry an implied warranty that, if carried out by the contractor, the specifications will produce a satisfactory product or result. [Ref. 20] If the specification is proven defective, the Government must buy the

product or service. This weakness is most prevalent in disputes involving Government changes to product designs or specifications. Due to the relatively high number of cases involving defective GFE/specifications, this area of Government contracting weakness is a problem and should be carefully monitored in order to prevent contractor claims for Government breach of contract.

6. Lack of Evidence / Proof

In 11, or 3.8%, of the 289 appeals researched, the Government's inability to disprove a contractor's allegation led to a sustained decision in favoring the contractor. In this Government contracting weakness category, three (23.1%) were for supply contracts, six (46.1%) were for service contracts, three (23.1%) were for construction contracts, and one (7.7%) was for an unspecified service. Further analysis of the data indicates that this particular weakness contributed to two (15.4%) denied decisions, seven (53.8%) sustained decisions, and four (30.8%) denials of decision by summary judgment. The U.S. Army had the most observed weaknesses in this area with four, or 30.8%, followed by the U.S. Navy with three, or 23.1%.

An example is *Mediatrix Interactive Technologies, Inc., ASBCA 43961*. The U.S. Navy requested that the Board reconsider a previously sustained decision in which a termination for default (T4D) was converted to a termination for convenience (T4C). The Board ruled that the Navy failed to provide compelling evidence or new legal theories. The burden of proof to overturn a previous Board decision is daunting. As shown in the previous section, 84.6% of all reconsiderations are denied by the Board. The Board's overall denied versus sustained records show that 118 (64.1%) of all appeals were denied, while only 66 (35.9%) were sustained. There is a significant difference between the

number of Government appeals denied by the Board due to lack of proof or evidence (13 appeals, or 4.5%, of all Government weaknesses) and the number of contractor appeals denied by the Board due to lack of proof or evidence (77 appeals or 26.7%, of all contractor weaknesses). This implies that the contractor is at a distinct disadvantage. The research further indicates that: 1) the CO and the acquisition team have a better system of checks and balances in the appeals process than does the contractor's team [Ref. 18]; 2) the contractor does not collect and document evidence effectively. If the COs can prove that they were not arbitrary, capricious, nor in any way negligent, the Board will rule in favor of the CO. Finally, it appears that, if the COs can prove that they earnestly sought a sound business decision, the Board will rule in favor of the COFD.

E. ANALYSIS OF OBSERVED CONTRACTOR WEAKNESSES

Through an analysis of the 289 litigated supply, service, and construction cases, this research identifies several potential weaknesses in the contractor's contracting practices. These weaknesses have been categorized into general groups for easier understanding and are listed by frequency of occurrence in Table 13. More than one weakness may relate to a single case and not all cases had an identifiable weakness.

	Observed Weaknesses in Contractor's Contracting Appeals / Practices	Freq.	Percent of Cases
1	Lack of evidence/proof of allegation to back claim	77	26.6%
2	Failure to meet schedules or delivery dates	44	15.2%
3	Product or service NOT to specification	34	11.8%
4	Poor contractor judgment	33	11.4%
5	Contractor untimely claims/ appeals	25	8.7%
6	Poorly estimated proposals	18	6.2%
7	Contractor misunderstood the contract	15	5.2%
8	Escalating costs/poor financial records keeping	15	5.2%
9	Premature claim	14	4.8%
10	Personnel problems / Lack of internal communications	13	4.5%
--	Total observed Contractor's contracting / appeals weaknesses	288	

Table 13 Observed Weaknesses in Contractor's Contracting Practices

Source: Developed by the researcher

The analysis in this section focuses on the top five identified contractor weaknesses shown in Figure 23:

- Lack of evidence/proof of allegation to back claim;
- Failure to meet schedules or delivery dates;
- Product or service not to specification;
- Poor contractor judgment; and
- Contractor untimely claims or appeals.

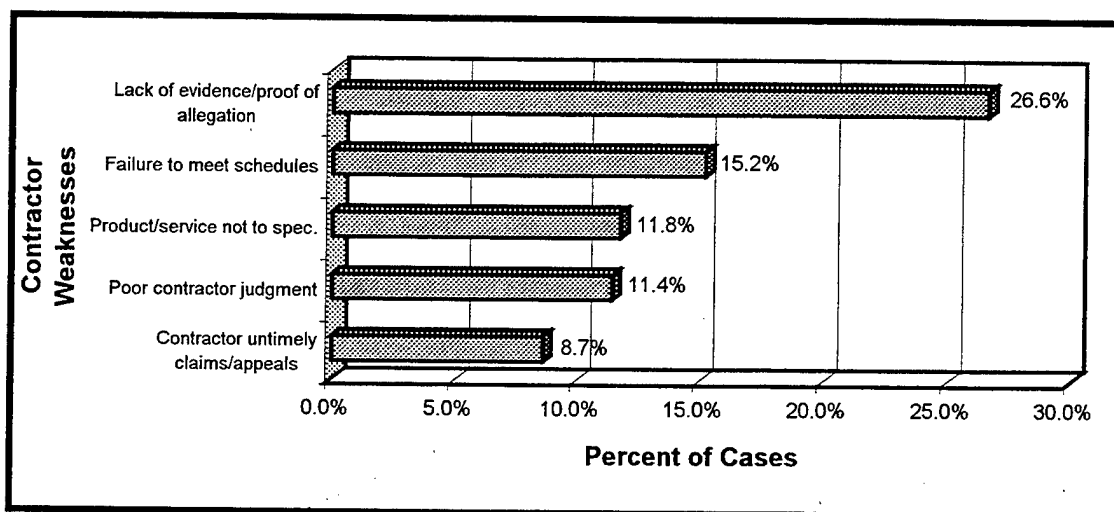


Figure 23 Observed Weaknesses in Contractor's Contracting Practices

Source: Developed by the researcher

1. Lack of Evidence/Proof

The researcher identified the contractor's inability to meet the Board's required burden of proof in 77, or 26.6%, of the 289 contract appeals. In this observed contractor weakness category, 19 appeals (24.7%) were for a supply contracts, 19 (24.7%) were for service contracts, 31 (40.2%) were for construction contracts, and eight (10.4%) involved an unspecified service or requirement. Further analysis of the data indicates that this weakness contributed to 58 (75.3%) denied decisions, six (7.8%) sustained decisions (due to other, mitigating factors), ten (13%) split decisions, and three (3.9%) denials of summary judgment and the cases are still pending.

In *Pacific Ship Repair & Fabricating, ASBCA 49288*, the U.S. Navy awarded a \$10,529,064 FFP Job Order type contract to repairs to the lower stage weapons elevators on USS Nimitz (CVN 68). The contractor cited constructive changes were introduced by the Government via multiple change orders, and claimed a \$384,201 equitable adjustment. The CO issued 23 job order modifications to accommodate a total of 31 change orders.

The contractor failed to prove financial hardship since both parties had agreed to all 23 job order modifications, therefore the Board denied the appeal.

Review and analysis of the 77 identified cases suggests that if the contractor fails to provide "documentary evidence" or fails to provide a professional witness, the judge will likely decide in favor of the COFD. This contractor weakness was seen mostly in contracts disputes involving: 1) Government changes to product design or specification; and 2) allegation of Government delays. Further research suggests that the contractor does not have the elaborate system of "checks and balances" that the Government has at its disposal. As a result, the contractor is more likely than their Government counterparts to file a claim as an emotional response rather than as a sound business decision. [Ref. 18] Most contractors also have the obvious disadvantage of having to hire legal representation outside of their firm. Outside legal representation may not have the contractor's best interests at heart and may litigate a claim regardless of its merit. [Ref. 19] These examples suggest a valid reason for the heavy contractor denial rate of 64.1% of all appeals decided by the Board.

2. Failure to Meet Schedules or Delivery Dates

In 44, or 15.2%, of the 289 appeals, the identified weakness in contractor performance was the inability of the contractor to stay on schedule or to meet delivery dates or schedules. In fact, failure to meet contract schedules and deadlines was the most frequent contractor weakness identified in this research and indicates a serious problem for both contractor and the Government. In this weakness category, 24 appeals (54.5%) were for supply contracts, five (11.4%) were for service contracts, 14 (31.8%) were for construction contracts, and one (2.3%) involved an unspecified type of service. Further

analysis of the data indicates that this particular weakness contributed to 28 (63.6%) denied decisions, five (11.4%) sustained decisions (due to other mitigating factors), six (13.6%) split decisions, one (2.3%) dismissal, and four (9.1%) denials of decision by summary judgment and these cases are still pending.

An example of this type of contractor weakness can be seen in *Alasace Industrial, Inc., ASBCA 51709*. DLA issued a purchase order for 184 output couplers. The contractor appealed the COFD, which denied the contractor a third delivery extension. The Board denied this appeal, as well as a later contractor appeal for reconsideration.

After analyzing the appeals in this category, it appears that the Board looks favorably on the CO's practice of extending a delivery schedule at least once during the performance of a contract. This apparently establishes a pattern of cooperation and lets the contractor know that the Government is willing to show "good faith" in working around unanticipated difficulties. [Ref. 17] There were no cases where the Board sustained an appeal after the CO extended the delivery schedule or date more than twice during the performance of the contract. In two instances, the Board expressed displeasure about the fact that the CO showed too much good faith. It is also reasonable to conclude that the contractor sometimes agrees to an overly optimistic delivery schedule/date to just to get the contract award. COs should be aware of this fact and also what constitutes a reasonable delivery schedule before pushing the contractor into a contract that will ultimately require extension modifications.

3. Product/Service Not to Specifications

Product or service not meeting contract specifications can result from several scenarios. These include: 1) not using the required material identified in the contract; 2)

using the wrong manufacturing or assembly technique; and 3) incorrect or out-of-tolerance specifications. This weakness appeared in 34, or 11.8%, of the 289 appeals. In this category, 14 appeals (41.2%) were for supply contracts, nine (26.5%) were for service contracts, 11 (29.4%) were for construction contracts, and one (2.9%) was for an unspecified service. Further analysis of the data indicates that this particular contractor weakness contributed to 18 (52.9%) denied decisions, five (14.7%) sustained decisions (due to other, mitigating factors), two (5.9%) split decisions, two (5.9%) dismissals, and seven (20.6%) denials of summary judgment and these cases are still pending.

An example of this contractor weakness is seen in *Emerald Corp. Ltd, ASBCA* 51533. In this appeal, the U.S. Air Force issued a FFP contract that required the manufacture and delivery of 2000 chock blocks and 2000 secure blocks for vehicles being transported to and from Bosnia. First article samples were unacceptable due to the excessive number of deviations from the required specifications. Emerald never requested a deviation from specifications. The CO gave Emerald two opportunities to make corrections, with no satisfactory result. The CO terminated the contract for default (T4D). The appeal from Emerald was denied.

When contractors agree to a contract that requires certain specifications be met, they are bound to the terms of that contract. Only a bilateral or unilateral modification issued by the CO will legally free the contractor of that specification requirement. The data indicates that this weakness is most commonly associated with the following contract disputes: 1) terminations for default, and 2) Government changes to designs or specifications. Contractor weaknesses involving product specification issues appear to be a serious problem. The contractor is not always to blame. As mentioned above, one of

the most frequent disputes associated with products and services not meeting specifications is the fact that the Government frequently imposes changes to designs or specifications. If the Government representative, and in particular, the CO has failed to communicate a change to contract requirements, designs or specifications, then the Government is also at fault. However, as shown in the example with Emerald Corp, Ltd, the contractor was apparently not communicating their difficulties effectively to the CO. Lack of effective communication between the two parties in dispute will only create greater problems. In addition to effective communications before and during the contract, the research suggests that effective market research and past performance checks will prevent future occurrences of poor product or service output. Placing a high priority on past performance during source selections will ultimately yield a superior product on time and on budget. Finally, the use of pre-solicitation conferences and post-award conferences will also lead to a better understanding of contract requirements on the part of the contractor as well as the Contracting Officer.

4. Poor Contractor Judgment

Of the 289 appeals, 33, or 11.4%, involved instances of poor contractor judgment. Poor contractor judgment runs the gamut from defective pricing allegations to bribery and corruption. In this category, 12 (36.3%) appeals were for a supply contracts, eight (24.3%) were for service contracts, 12 (36.3%) were for construction contracts, and one (3.1%) was for an unspecified service. Further analysis of the data indicated that this particular contractor weakness contributed to 16 (48.5%) denied decisions, one (3.1%) however was sustained due to other mitigating factors, three (8.9%) were split decisions,

five (15.2%) were dismissed, and eight (24.3%) were denied summary judgment and are pending a full hearing.

One of several examples is *Ralbo, Inc., ASBCA 49541*, a contract issued by the U.S. Navy for fluid regulating valves. The contractor falsely certified that it had not been terminated for default (T4D) in the past three years for any Government contract; when it actually had defaulted two years prior. In addition, the contractor was unable to deliver articles for first article testing. The Board denied the contractor's motion for summary judgment deciding in favor of a full hearing because several issues of material fact were in question. The Government will undoubtedly win this appeal because the Government could also terminate the contract under conditions of erroneous certification. [Ref. 18] The appeal is currently pending an ASBCA hearing and final decision.

The data indicates that poor contractor judgment was involved in cases of poorly estimated proposals, bribery, and defective pricing allegations. Poor contractor judgment can be brought on by actions of the Government or actions of the contractor alone. Contractors bidding on construction contracts, for example, are almost always required to conduct a site survey prior to submitting bids. The researcher read several cases where the judge noted that a site survey was either not conducted or was not conducted to the level required to identify patent (easily seen) defects in the solicitation. This in turn caused the contractor(s) to submit bids that clearly did not forecast contract difficulties. Government actions may also be partly to blame. If a statement of work (SOW) is ambiguous for example, the lowest priced bidder could have mistakenly underbid the true value of the contract and the work expected by the Government. Poor contractor judgment occurs

when the contractor fails to seek clarification and instead proceeds with the bid preparation.

Poor contractor judgment can also be brought on by inexperience of the contractor, either in doing business with the Government or within the industry (new start). In either case, the Government can actually help the contractor by conducting sound market research and past performance checks. This should detect potential problems within the contractors firm that they may not be aware of. A bidder debrief that identifies all areas that removed the bidder from the competitive range can cause the same contractor to submit future proposals that are potentially free of poor contractor judgment. If the contractor has won the bid, a post-award conference should be conducted in order to insure contract requirements are fully understood thus decreasing the probability of poor contractor judgment. Effective communication in general between all parties will greatly contribute towards preventing the contractor from making costly mistakes due to errors in judgment.

5. Contractor Untimely Appeals

In twenty-five, or 7.9%, of the 289 appeals, the contractor allegedly did not submit an appeal to a COFD in a timely manner or file a motion for reconsideration of a Board decision in a timely manner. In this category, six appeals (24.0%) were for a supply contracts, eight (32.0%) were for service contracts, three (12.0%) were for construction contracts, and eight (32.0%) were unspecified. Further analysis of the data indicated that this weakness contributed to six (24.0%) denied decisions, one (4.0%) sustained decision (due to other, mitigating factors), 16 (64.0%) were dismissed, and two (20.6%) were denied summary judgment.

An example is *Graham International, ASBCA 50481*. The Government motioned for the T4D appeal to be dismissed due to lack of jurisdiction—i.e., untimely appeal. Although the contractor submitted a properly certified appeal, it arrived at the ASBCA more than 90 days after confirmed receipt of the COFD. The Board is inflexible on this rule if the appeal is proven to have arrived after the 90-day maximum period; therefore, the Board dismissed the appeal for lack of jurisdiction.

Appendix B explains the appeals process, including timelines for appeals. The Boards of Contract Appeals (BCA) timeline is 90 days from date of COFD. The U.S. Court of Federal Claims will allow 12 months from COFD. An untimely appeal to a BCA surrenders jurisdiction of that Board. The Board must dismiss the appeal and defer the appeal to the U.S. Court of Federal Claims. [Ref. 17] In analyzing the appeals involving the question of timeliness, the research found that a contract disputes clause was inserted in all contracts. This point was emphasized by the judge's reference of a contract disputes clause in the findings-in-fact section of each written appeals decision. The research suggests that the contractors may not be familiar with claims and disputes procedures. Contributing to this problem is the fact that the Government often builds lengthy and voluminous contracts, which may cause some contractors to focus only on the requirements section while electing not to read the contract clauses. The researcher found untimely appeals more often in T4D contract disputes and in appeals submitted under the Equal Access to Justice Act.

When the CO renders a COFD, the decision must include a paragraph explaining the appeal procedures. An excerpt of this paragraph is found in Chapter II, p. 8-9 of this thesis. In short, it explains to the contractor the criteria, timelines, and certification

requirements for submitting a timely appeal. The same type of explanation is given to the contractor by the Board once a decision is rendered. The research concludes that the Government meets its obligation of informing the contractors of their appeals or reconsideration rights, therefore the burden of proof of a timely appeal falls solely on the contractor.

F. SUMMARY ANALYSIS

This section summarizes general trends identified from the research data. The following areas will be discussed:

- Contract dispute trends;
- Government weaknesses; and
- Contractor weaknesses.

1. Contract Dispute Trends

Generally, the Government prevails in two-thirds of all contractor appeals cases. Tables 14A and 14B summarize the ten most frequently disputed categories. These tables provide summary statistics and document recurring Government and contractor weaknesses by category of dispute.

The highest number of disputes occurred when the Government made contract changes to product or service design or specifications, or when the Government terminated the contract for default. As Table 14 A and B shows, the Government wins over 70% of all contract disputes in these two categories. The research data also indicate

No.	Decision Category	Decisions Statistics					Total Decisions	Percent of total cases
		Win	Loss	SJ	Diss	Split		
1.	Government changes to designs or specifications	19	8	9	0	8	44	15.2%
2.	Government Terminations for Default (T4D)	20	8	7	2	7	44	15.2%
3.	Contractor claim for Government delays	8	10	10	2	9	39	13.5%
4.	Government accelerations or constructive changes	15	9	2	1	5	32	11.1%
5.	Government Terminations Convenience (T4C)	13	8	1	0	5	27	9.3%
6.	Withholding or delay of payments or amount of equitable adjustment	6	3	3	3	3	23	8.0%
7.	Contractor fees incurred in successfully defending or winning on appeal	5	11	0	4	0	20	6.9%
8.	Differing site conditions	5	3	2	0	5	15	5.2%
9.	Contractor appeal of assessed liquidated damages	6	1	4	1	3	15	5.2%
10.	Contractor appeal to Govt allegation(s) of defective pricing	3	3	6	0	1	13	4.5%

Table 14 Summary of Contract Disputes (Part A)

Source: Developed by the researcher

No.	Decisions Statistics					Overall Win/Loss by Categ.	Recurring Government Weaknesses	Recurring Contractor Weaknesses
	Reqd	Win	%	Loss	%			
1.	Supl	6	75%	2	25%	70.4% / 29.6%	1) Govt disruptions or delays. 2) Lack of timely CO actions.	1) Lack of evidence or proof. 2) Product not to specifications.
	Serv	7	70%	3	30%			
	Const	6	66%	3	34%			
2.	Supl	15	79%	4	21%	71.4% / 28.6%	1) Inadequate past perf. checks. 2) Inade. market research.	1) Failure to meet schedule. 2) Product not to specifications.
	Serv	1	34%	2	66%			
	Const	4	66%	2	34%			
3.	Supl	2	50%	2	50%	44.4% / 55.6%	1) Govt disruptions or delays. 2) Lack of timely CO actions.	1) Lack of evidence or proof. 2) Failure to meet schedules.
	Serv	1	25%	3	75%			
	Const	5	50%	5	50%			
4.	Supl	2	66%	1	34%	62.5% / 37.5%	1) Govt disruptions or delays. 2) Untimely CO final decision.	1) Lack of evidence or proof. 2) Poor contractor judgment.
	Serv	5	71%	2	29%			
	Const	8	57%	6	43%			
5.	Supl	6	55%	5	45%	61.9% / 38.1%	1) CO not familiar with the contract. 2) Untimely CO decision	1) Lack of evidence or proof. 2) Product not to specifications.
	Serv	5	63%	3	37%			
	Const	2	100	0	0%			
6.	Supl	1	100	0	0%	42.8% / 57.2%	1) Arbitrary and capricious. 2) Lack of auth. w/hold payment.	1) Poorly estimated proposals. 2) Lack of evidence or proof.
	Serv	3	30%	7	70%			
	Const	2	66%	1	34%			
7.	Supl	0	0%	1	100	33.3% / 66.7%	1) CO not familiar with contract. 2) Govt lack of proof.	1) Contractor untimely claims and appeals.
	Serv	2	40%	3	60%			
	Const	1	34%	2	66%			
	Not sp	2	29%	5	71%			
8.	Supl	0	0%	0	0%	62.5% / 37.5%	1) Govt disruptions or delays. 2) Untimely CO decision	1) Lack of evidence or proof. 2) Failure to meet schedules.
	Serv	0	0%	1	100			
	Const	5	71%	2	29%			
9.	Supl	0	0%	0	0%	85.0% / 15.0%	1) CO not familiar with contract. 2) Lack of auth. w/hold pmt.	1) Failure to meet schedules. 2) Lack of evidence or proof.
	Serv	0	0%	0	0%			
	Const	6	85%	1	15%			
10.	Supl	2	66%	1	34%	50.0% / 50.0%	1) Lack of contract monitoring. 2) CO not familiar with contract.	1) Cost contr./ poor financial records. 2) Poor est. proposals.
	Serv	1	34%	2	66%			
	Const	0	0%	0	0%			

Table 14 Summary of Contract Disputes (Part B)

Source: Developed by the researcher

Government wins more often than the contractor in contract disputes involving Government accelerations or constructive changes, terminations for convenience, contractor allegations of differing site conditions, and assessments for liquidated damages.

The contractor tends to win most contract disputes involving allegations of Government-caused delays, wrongful withholding of progress payments/final payments or challenges to the amount of equitable adjustment, or Government challenges to the paying of contractors legal expenses of contractors who previously won a sustained decision from the Board. Allegations of defective pricing is an area of dispute in which the contractor lost as many appeals as it won. Interestingly, half of the defective pricing cases analyzed are still pending due to discrepancies in the material facts of the cases.

2. Government Weaknesses

The most significant weakness in Government contracting practices involves disruptions and delays, which occurred in 16.6% of all contract disputes. This weakness was the most significant contributor to a contract dispute in four of the ten most frequent dispute categories, as shown in Table 14 A and B.

Contracting Officers contributed to Government contracting weaknesses in three separate areas: 1) unfamiliarity with the contract language; 2) lack of timely actions (interpretations, modifications, etc.); and 3) untimely Contracting Officer's final decisions. Collectively, 25.9% of all contract disputes involved these weaknesses. Defective GFE/GFP and specifications also contributed, but to a lesser degree, with allegations seen in 4.5% of all contract disputes.

The above-listed weaknesses accounted for over 65% of the contract weaknesses exhibited by Government contracting organizations. The additional 35% occurred less

frequently and were determined not to be significant problems for Government contracting organizations.

3. Contractor Weaknesses

Contractors' most significant weakness, in genera, was their inability to produce the required proof or evidence that Government actions caused damages. This weakness was noted in over 25% of all cases analyzed. The data indicate that a poor system of checks and balances, in combination with the use of outside attorneys who are willing to litigate even weak cases, was the most significant reasons for this weakness and contribute to the overall win/loss record.

Failure by the contractor to deliver the product or service on time and failure to deliver the product or service in accordance with contract specifications collectively contributed to 27% of all contract disputes.

Poor contractor judgment also contributed significantly to contractor weaknesses and was involved in 11.4% of all appeals cases. Generally, contractors did not conduct site surveys, committed defective pricing violations, or were proven to have committed bribery or other forms of unethical activity.

The above categories accounted for almost two-thirds of all contractor weaknesses during the period analyzed. The other six weakness categories occurred less often and, therefore were not statistically significant.

G. SUMMARY

The overall conclusion from the analysis of data collected in supply, service, and construction contracts appealed from Contracting Officers' final decisions is that a little

time invested in better communication before, during, and after contract performance will potentially alleviate, or at least decrease, the number of performance delays, products not meeting specifications, delays of payments, assessments of liquidated damages, and enhance the ability of the Government to procure the supplies and services it needs. Chapter V includes a summary of these conclusions.

V. CONCLUSIONS AND RECOMMENDATIONS

A. INTRODUCTION

This chapter provides answers to the primary and secondary research questions and presents conclusions and recommendations drawn from the data in Chapter III and the analysis in Chapter IV. The chapter then presents suggestions for further study of supply, service, and construction contract litigation.

B. RESEARCH QUESTIONS

To accomplish the aim and objectives of this thesis, the researcher developed primary and secondary research questions. The responses to these questions are included in this section.

1. Primary Research Question

To what extent will an analysis of resolved Armed Services Board of Contract Appeals (ASBCA) decisions provide insight into the nature of Government contract disputes and suggest ways to reduce such disputes in the future?

Analyzing recent ASBCA decisions provided an unbiased sense of why contracts issued by Government, and DoD agencies in particular, ended in dispute and subsequent litigation. The following are some of the general observations:

- Disputes arise most frequently because of disruptions caused by Government delays, accelerations, changes, interference, faulty contract interpretations, faulty Government Furnished Equipment (GFE) or specifications, and Contracting Officer's lack of familiarity with the contract terminations for default (T4D) or convenience (T4C) and assessment of liquidated damages;

- Many contract disputes reflect inadequate communications between Government and contractor representatives before, during, and after performance of the contract;
- Contractors tend to file sometimes frivolous appeals in response to a Contracting Officer's final decision, even if their case is weak; and
- Contracting Officers are not rendering timely final decisions in accordance with the Federal Acquisition Regulation (FAR) or the Contract Disputes Act of 1978.

The following are suggested ways of reducing contract disputes in the future:

- Effective use of post-award conferences;
- Establish effective communications early in the procurement process;
- Reduce Government disruption and interference. Enforce the single-face-to-industry policy;
- Accurately determine the need or requirement;
- Establish an effective training program for the Contracting Officers and their staff; and
- Conduct effective market research and past performance checks.

2. Secondary Research Questions

a. What is the current policy and process for handling contract disputes?

Contract disputes are handled in accordance with the Contracts Dispute Act of 1978 (CDA). As Appendix B illustrate, any contract claim submitted by the contractor must be forwarded to the Contracting Officer (CO). The CO has 60 days to issue a Contracting Officer's final decision (COFD). If the COFD is not favorable to the contractor, he or she may submit an appeal (certified if greater than \$100,000) either to a Board of Contract Appeals (BCA) within 90 days of receipt of the COFD or to the U.S. Court of Federal Claims within 12 months of receipt of the COFD. Both courts have

identical authority under law. While BCAs tend to be less formal and have a quicker turn-around time, they usually have three judges to persuade. [Ref. 17] The U.S. Court of Federal Claims tends to hear the more complex contract dispute cases. [Ref. 15] If either court issues an unfavorable decision, the contractor may appeal the decision to the Court of Appeals for the Federal Circuit within 60 days of receipt of a decision by the U.S. court of Federal Claims or within 90 days of receipt of a decision by a BCA. If the Court of Appeals for the Federal Circuit denies the appeal, the contractor may then appeal this decision, with the approval of the Attorney General, to the U.S. Supreme Court.

b. What will an analysis of DoD contract disputes resolved through litigation between January 1998 and June 1999 suggest about the nature of DoD contract disputes?

Based on examination of 289 cases, the following general trends were noted:

- Government tends to win two-thirds of all appeals;
- Government changes to product design or specifications and contractor challenges to terminations for default (T4D) are litigated more often than any other dispute category. Both Government changes and T4D disputes are won by the Government over 70% of the time;
- Contractors win claims for Government delays in over 50% of all appeals;
- Construction contract disputes are more likely to have more than one reason for dispute;
- Contractors are more likely to win service contract disputes than supply or construction disputes;
- The contractors' most significant contracting weaknesses include: 1) inability to prove allegations; 2) inability to deliver the products or services according to the delivery schedule; and 3) inability to deliver a product or service according to specification; and

- ASBCA Judges are highly experienced, technically savvy, and extremely detailed when examining evidence presented by either party.

c. What will an analysis of the research results suggest about weaknesses in DoD contracting norms and execution practices?

The research revealed 12 categories of weaknesses in DoD contracting norms and execution practices. An analysis of these categories indicate that the number one weakness is DoD Contracting Officers or DoD customers directing changes, causing constructive changes, or causing delays while the contractor is on-site attempting to execute the contract. This was especially evident in both construction and shipboard repair contracts. The second, third and fourth most frequently observed contracting weaknesses involved the CO. Lack of familiarity with contract terms or language, lack of timely CO action (reviews, modifications), and untimely COFDs constituted almost 25% of all observed acquisition weaknesses. The research indicated that there is a need for on-going training for the COs and their organizations, as well as a need for effective communication between the CO and the contractor. Government contracting, and in particular DoD contracting, often is reactionary; the sense of urgency takes precedence over training and effective two-way communications between parties.

d. What will an analysis of the research results suggest about weaknesses in the contractor's contracting norms and execution practices?

This research identified ten categories of weaknesses among contractors performing DoD contracts. The most significant weakness was not directly related to contracting practices; rather, it was contractors' inability to meet the required burden of proof in their claim(s) against the Government. The average contractor, even with an

attorney, is generally no match for a highly experienced, technical-minded ASBCA judge. Most contractors also lack an elaborate system of "checks and balances." As a result, their decision to file a claim or appeals is probably more an emotional decision rather than a business decision. Furthermore, most contractors are represented by outside legal counsel, who may be more motivated to litigate than to settle out of court. Of the more conventional contracting weaknesses observed, the largest contractor problems include: 1) their inability to stay on schedule and meet delivery dates; 2) products or service not meeting the required contract specification(s); 3) poor contractor judgment; 4) submitting untimely appeals; and 5) poorly estimated proposals.

e. What will further analysis of the research results suggest about ways to reduce DoD contract disputes?

Generally, the research data indicate that the majority of DoD contract disputes arise when Government personnel direct the contractor to perform work outside the Statement of Work (SOW) or beyond the scope of the contract. The contractor then requests an equitable adjustment, which is either negotiated and remedied by contract modification or denied by COFD. Again, the most significant contractor weakness is the inability to prove that damage has occurred and an equitable adjustment is warranted. Better communication between the CO and the contractor throughout the contract performance is extremely important. Furthermore, the contractor should take direction only from the designated Government representative, whether that be the Administrative Contracting Officer (ACO) for in-plant contracting organizations, or a Contracting Officers' technical representatives (COTR) for work performed at remote or multiple locations.

f. What will further analysis of the research results suggest about ways to reduce DoD contract disputes being decided against the Government?

This research developed a checklist, shown in Appendix D, that may assist contracting organizations experiencing difficulties with a contract or contractor. The Government contracting organizations that prevail in an appeal decided by the Board can generally prove that they made deliberate efforts to make the contractor successful, establishing a pattern of cooperation. [Ref. 17] These efforts may include minor schedule revisions, a willingness to negotiate monetary compensation for additional work performed, or issuing timely show cause and cure notice letters if and when warranted. If the CO can show that a reasonable effort was made to comply with all regulations and procedures and that all procedural steps were taken and documented, the Government Contracting Officer will likely prevail in the appeal decision.

C. CONCLUSIONS

The answers to the research questions have led to the following conclusions:

- Contractors usually lose their appeal of the COFD because of inadequate hard evidence/proof that the Government acted outside the bounds of the contract;
- There appears to be insufficient two-way communication between the contractor and the Government agency;
- Allegations of Government disruptions, delays, accelerations, and changes are the primary reasons that contractors choose to file claims;
- The Government made at least some effort to work with the contractor's difficulties in most cases, thus establishing a pattern of cooperation. This was reflected in the number of bilateral modifications and comments by the ASBCA judges;

- Contracting Officers' final decisions were not always issued within the time limits established by the Contract Disputes Act, thereby increasing the potential for premature claims and subsequent litigation; and
- There is strong evidence that all judges on the Board are very thorough and well versed in all technical areas of supply, construction, and service contracts. Explained another way, the Board seldom leaves a stone unturned. To this end, the Board judges easily spot inconsistencies in evidence and testimony; thus, the level of evidence most contractors provide is not sufficient to overturn a well-made Contracting Officers' final decision.

D. RECOMMENDATIONS

This research suggests the following recommendations for preventing unreasonable claims and subsequent costly litigation:

- Always stay on guard for signs of contractor difficulty/weakness, including: schedule extensions, insistence on progress payments or pre-payments, excessive technical questions, and arguments of specification limits and tolerances;
- Conduct past performance checks, especially if the contractor is new to working with Government contracts, or new to producing the type of item or material required in the contract;
- Forward draft solicitations or draft statements of work to industry, if and when possible, and hold pre-solicitation conferences as required;
- Keep good contract files and records—If it isn't in writing, it didn't happen!;
- Develop a good working relationship, trust, and effective communications with each contractor, from the initial requirements through final contract closeout;
- Hold tailored training for Contracting Officers and buying teams in areas where the contracting office has little experience or has been experiencing large numbers of claims;
- Hold post-award conferences with winning contractors to insure that they understand contract requirements fully, and that they know who the

Government point-of-contact will be and who can authorize contract changes;

- Increase the use of performance work statements (PWS) and statements of objectives (SOO) to decrease contract ambiguities and claims for implied warranty and, instead, maximize contractor innovation;
- When issuing Contracting Officers' final decisions denying contractors' claims, insure this is done in a timely manner with detailed and factual information;
- Maximize the use of alternative dispute resolution (ADR) methods whenever possible in order to minimize costly and time-consuming litigation.

E. AREAS OF FURTHER RESEARCH

The scope of this thesis was limited to appeals cases brought before the Armed Services Board of Contract Appeals (ASBCA) between January 1998 and June 1999. These cases generally were initiated by DoD contractors involved in supply, services and construction contracts. Had scope and time allowed, this thesis would have addressed the following areas of research :

- Comparison of ASBCA decisions with those of the U.S. Court of Federal Claims, focusing on denial v. sustained decisions, reasons for dispute, and the types of cases handled by each of the two courts.
- Analysis of awarding activities with the highest numbers of ASBCA or the U.S. Court of Federal Claims appeals, focusing on why these activities have higher numbers of claims and subsequent appeals than other activities;
- Comparison between the amount claimed in the initial appeal and the amount awarded to the contractor in a sustained decision against the Government, to determine the most typical sources of weakness in the contractor's appeal;
- Mirror study of pre-award protests using the same type of population, data-gathering techniques, and data-presentation model as shown in this thesis.

APPENDIX A. SELECTED ACRONYMS

ACO	Administrative Contracting Officer
ADR	Alternative Dispute Resolution
AAFES	Army / Air Force Exchange Service
ASBCA	Armed Services Board of Contract Appeals
BOA	Basic Ordering Agreement
BOB	Bureau of the Budget
BRAC	Base Realignment and Closure
CDA	Contract Disputes Act
CO	Contracting Officer
COFD	Contracting Officer's Final Decision
COTR	Contracting Officer's Technical Representative
CPAF	Cost-Plus-Award-Fee Contract
CPFF	Cost-Plus-Fixed-Fee Contract
CPIF	Cost-Plus-Incentive-Fee Contract
DFARS	Defense Federal Acquisition Regulation Supplement
DOD	Department of Defense
DOE	Department of Energy
DOL	Department of Labor
DON	Department of the Navy

DONOMIT Department of the Navy Organization and Infrastructure Team

FAR Federal Acquisition Regulation

FFP Firm Fixed-Price Contract

FPEA Fixed-Price with Economic Price Adjustment Contract

FPI Fixed-Price Incentive contract

FPIF Fixed-Price Incentive Firm Contract

FY Fiscal Year

GFE Government Furnished Equipment

GFP Government Furnished Property

IFB Invitation for Bid

JO Job Order

K Contract

KTR Contractor

MWR Morale Welfare and Recreation

NAFI Nonappropriated Funding Instrument

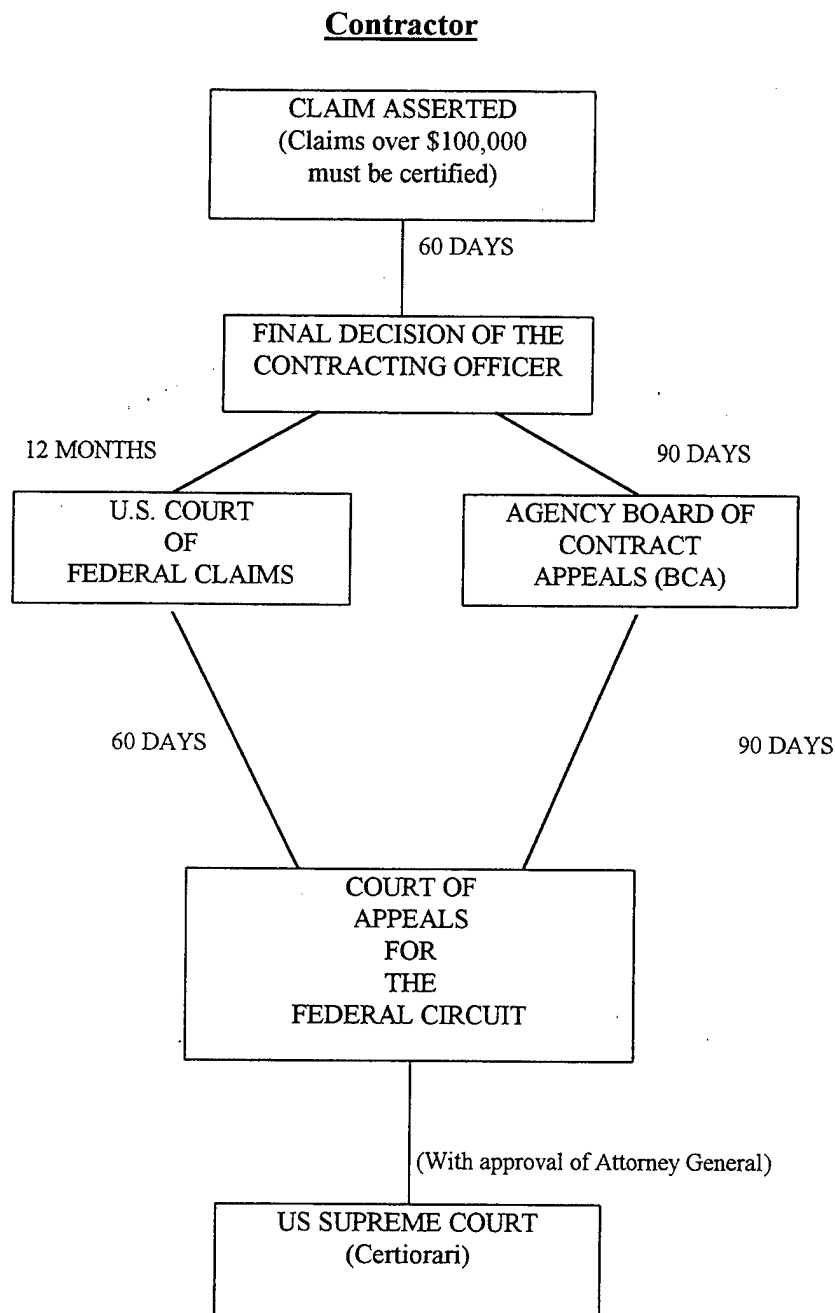
OFPP Office of Federal Procurement Policy

OMB Office of Management and Budget

PBA	Priced Based Acquisition
PCO	Procuring Contracting Officer
PMRS	Procurement Management Reporting System
PO	Purchase Order
REA	Request for Equitable Adjustment
RFP	Request for Proposals
SOW	Statement of Work
SOO	Statement of Objectives
TINA	Truth in Negotiations Act
T/M	Time and Materials Contract
T4C	Termination for Convenience
T4D	Termination for Default
VECP	Value Engineering Change Proposal

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APPENDIX B. DISPUTES PROCESS DIAGRAM



Source: Cibinic and Nash, 1995. [Ref. 8: p. 1241]

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APPENDIX C. DISPUTES CLAUSE

The following is a copy of the current Disputes Clause used in all contracts:

DISPUTES CLAUSE

(FAR 52.233-1)

(a) This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C.601-613).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.

(c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding \$100,000 is not a claim under the Act until certified as required by subparagraph (d)(2) of this clause. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(d)(1) A claim by the Contractor shall be made in writing and, unless otherwise stated in this contract, submitted within 6 years after accrual of the claim to the Contracting Officer for a written decision. A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.

(2) (i) The Contractor shall provide the certification specified in paragraph (d)(2)(iii) of this clause when submitting any claim exceeding \$100,000.

(ii) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.

(iii) The certification shall state as follows: "I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the Contractor."

(3) The certification may be executed by any person duly authorized to bind the Contractor with respect to the claim.

(e) For Contractor claims of \$100,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over \$100,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.

(f) The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in the Act.

(g) If the claim by the Contractor is submitted to the Contracting Officer or a claim by the Government is presented to the Contractor, the parties, by mutual consent, may agree to use alternative dispute resolution (ADR). If the Contractor refuses an offer for ADR, the Contractor shall inform the Contracting Officer, in writing, of the Contractor's specific reasons for rejecting the offer.

(h) The Government shall pay interest on the amount found due and unpaid from

(1) the date that the Contracting Officer receives the claim (certified, if required); or

(2) the date that payment otherwise would be due, if that date is later, until the date of payment.

With regard to claims having defective certifications, as defined in FAR 33.201, interest shall be paid from the date that the Contracting Officer initially receives the claim. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim.

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

APPENDIX D. TERMINATION FOR DEFAULT CHECKLIST

The following are recommended courses of action for the Contracting Officer when it is suspected that a contractor claim is forthcoming or when it appears the contractor is either incapable of performance or fails to comply with one or more contract requirements:

Action

- | | | | |
|-----|----|--|---|
| Yes | No | 1) Contract requirement, SOW, or language ambiguous? | Has a post-award conference been conducted? |
| Yes | No | 2) Contractor allowed access to all data? | |
| Yes | No | 3) Documented evidence of communications with the contractor? | |
| Yes | No | 4) Evidence of at least one contract delivery extension? | |
| Yes | No | 5) Evidence of proper contract monitoring by the Government Agency? | |
| Yes | No | 6) Verbal indicators by contractor of contract financing difficulty? | |
| Yes | No | 7) Other evidence by Government agency of contractor difficulty? | |
| Yes | No | 8) PCO or ACO issued a SHOW CAUSE letter? | |
| Yes | No | 9) Improvements in contractor performance been noted? | |
| Yes | No | 10) PCO or ACO issued a CURE NOTICE letter? | |
| Yes | No | 11) Conducted a closer look at contractor performance: | |
| | | - Site or factory visit | |
| | | - DCMC audit (if required) | |
| | | - DCAA audit (if required) | |
| Yes | No | 12) Issued T4D NOTIFICATION in writing to contractor? | |
| | | - Issue memo explaining T4D determination | |
| Yes | No | 13) Issued COFD to contractors T4D claim in a timely manner? | |
| | | - Explained contractors right to appeal? | |
| | | - Consulted legal counsel? | |
| Yes | No | 14) Conducted audit of Rule 4 (contract documentation) | |
| | | - Prepared to send Rule 4 file to BCA or Court of Fed. Claims? | |

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**APPENDIX E. ARMED SERVICES BOARD OF CONTRACT APPEALS
FISCAL YEAR 1998 ANNUAL REPORT**

Armed Services Board of Contract Appeals

Skyline Six

5109 Leesburg Pike

Falls Church, VA 22041-3208

MEMORANDUM FOR: THE SECRETARY OF DEFENSE

THE SECRETARY OF THE ARMY

THE SECRETARY OF THE NAVY

THE SECRETARY OF THE AIR FORCE

SUBJECT: Report of Transaction and Proceedings of the Armed Services Board of
Contract Appeals for the Fiscal Year Ending 30 September 1998

This report is furnished under paragraph 9 of the Charter of the Armed Services Board of Contract Appeals, revised 1 July 1979. The statistics reflect the adjudication of appeals of the Army, Navy, Air Force, Defense Logistics Agency (DLA), and other defense agencies. Also included are appeals of various executive agencies which have been adjudicated under inter-agency arrangements, as provided in 41 U.S.C. 607 (c).

The following statistics cover activities of the Board during the reporting period and the current reserve of pending matters:

A.	Appeals docketed during FY 1998 (includes 58 reinstatements)	796
B.	Appeals disposed of during FY 1998	855
C.	Number of Appeals Pending 1 October 1981	1301
	Number of Appeals Pending 1 October 1982	1594
	Number of Appeals Pending 1 October 1983	1695
	Number of Appeals Pending 1 October 1984	1729
	Number of Appeals Pending 1 October 1985	2074
	Number of Appeals Pending 1 October 1986	2096
	Number of Appeals Pending 1 October 1987	2503
	Number of Appeals Pending 1 October 1988	2355
	Number of Appeals Pending 1 October 1989	2321
	Number of Appeals Pending 1 October 1990	2462
	Number of Appeals Pending 1 October 1991	2367
	Number of Appeals Pending 1 October 1992	2198
	Number of Appeals Pending 1 October 1993	2027
	Number of Appeals Pending 1 October 1994	1977
	Number of Appeals Pending 1 October 1995	1822
	Number of Appeals Pending 1 October 1996	1543
	Number of Appeals Pending 1 October 1997	1325
	Number of Appeals Pending 1 October 1998	1266
	Net Decrease in Docket, FY 1998	59

D. Source of Appeals Docketed FYs 1994-98

	<u>FY 94</u>	<u>FY 95</u>	<u>FY 96</u>	<u>FY 97</u>	<u>FY98</u>
Air Force	311	251	169	140	147
Army	472	405	268	183	148
Corps of Eng	*	*	*	101	104
Navy	358	292	229	224	171
DLA	124	101	108	109	93
NASA	3	15	24	14	7
Other	133	149	211	64	68
Reinstated	<u>132</u>	<u>110</u>	<u>96</u>	<u>88</u>	<u>58</u>
Total	1533	1323	1105	923	796

E. Status of Appeals Pending End of FY 1998 (includes 33 Rule 12s):

Complaint Due	127
Answer Due	110
Discovery	622
To Be Set	39
Hearing Set	134
Transcripts & Briefs Due	83
Suspense	14
Ready to Write	<u>137</u>
Total	1266

F. Appeals disposed of during FYs 1994-98

1. Origin of Appeals:

	<u>FY 94</u>	<u>FY 95</u>	<u>FY 96</u>	<u>FY 97</u>	<u>FY98</u>
Air Force	359	287	305	177	131
Army	450	551	429	277	160
Corps of Eng	*	*	*	111	110
Navy	487	357	349	375	254
DLA	182	97	126	106	131
NASA	9	8	11	22	19
Other	73	164	126	57	41
Admin Disposals	23	14	28	16	9

2. Rule 12 Proceedings 238 180 147 173 137

3. Record only Dispositions 203 182 280 165 120

4. Disposition:

Dismissed	1150	1083	969	823	583
Denied	225	227	216	175	118
Sustained	<u>208</u>	<u>168</u>	<u>199</u>	<u>143</u>	<u>154</u>
Total	1583	1478	1384	1141	855

* Corps of Engineers appeals prior to FY 97 were included in the Army appeals

Of the Boards 1,266 active appeals, the army has 238 (18.8%), the Corps of Engineers has 163 (12.9%), the Navy has 335 (26.5%), the Air Force has 247 (19.5%), the DLA has 134 (10.6%), NASA has 15 (1.2%), and the remaining 134 appeals (10.6%) are from other sources. At the conclusion of FY 98, 3 of the appeals were court remands, 18 were applications under the Equal access to Justice Act, 7 were motions for reconsideration, and 33 were being processed under Board Rule 12 (8 expedited and 25 accelerated).

At the close of FY 98, the U.S. Courts of Appeals for the Federal Circuit had 29 cases on its docket relating to ASBCA decisions. The Board is not aware of any appeals pending before District Courts relating to ASBCA decisions. No requests have been received from District Courts for an advisory opinion under the Cochran Amendment (see Federal Acquisition Streamlining Act of 1994 (P.L. 103-355, Section 2354)).

During the fiscal year, the parties requested the Board's ADR services 63 times, covering 81 appeals and 9 pre-appeal disputes. The cases varied in amount from several thousand dollars to hundreds of millions of dollars. Of the 62 requests, 25 were binding ADR, while the remaining 37 requests were for non-binding ADR. During FY98, all but one of the ADR procedures involving the ASBCA resulted in a resolution of the matter.

The Board continues to struggle with the high-grade freeze and has not been able to hire a replacement judge since the spring of 1993.

PAUL WILLIAMS
Chairman

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APPENDIX F. ASBCA DECISION DATABASE

Note: The ASBCA Decision Database is constructed with MS Excel software and follows on pages 139 through 144

- Column Description:

- Case Name
- Case Number: ASBCA Docket Number
- Dispute Cause: See Chapter IV, pages 65-66 for dispute category
- Government Weakness: See Chapter IV, pages 88-89 for description
- Contractor Weakness: See Chapter IV, pages 99-100 for description
- SBA / Govt: Small Business Appeal or Government Appeal
- Reference: Column used to flag:
 - 1) Summary Judgment (Pending Decision)
 - 2) Reconsiderations
- Contract Type
- Branch of Service: Government Agency
- Type of requirement:
 - 1) Supply contract,
 - 2) Service contract,
 - 3) Constructions contract
 - 4) NS (Not specified in the case)
- Court Decision: Decision of the Board:
 - 1) Denied,
 - 2) Sustained
 - 3) Dismissed
 - 4) Split Decision
 - 5) Summary Judgment (pending decision)
 - 6) Not specified in the cases

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Appendix F
ASBCA Decision Database

No.	Case Name	Case No.	Dispute Cause	Govt weak	Contr. weak	SBA/ Govt	Ref.	Contr. Type	Branch of Service	Type of Reqt.	Court Decision
AAA	L.C. Laskins Construction, Inc.	50305	9	5	1,2			FFP	Air Force	Construction	Denied
BBB	The Ryan Company	50466	1,3	1,3	3		SJ	FFP	Navy	Service	Summary
CCC	AAA Engineering & Drafting	47940	1	4	9			NS	Air Force	Services	Denied
DDD	Hitt Contracting, Inc.	51594	1	1,3,4	9			D.O.	Navy	Services	Split
EEE	Senatra Health	51540	21	6		G	R	NS	Navy	Services	Denied
FFF	United Technologies Corp/	51410	10	7			SJ	NS	Air Force	Supply	Summary
GGG	Kirk/Marsland Advertizing,	51075	12,16		1,4	S	SJ	FFP	Dept HHS	Service	Summary
HHH	Mediast Interactive	43961	R	6		G	R	NS	Dept HHS	Supply	Denied
III	Nomura Enterprise, Inc.	51456	3,5,14	1				FFP	Army	Supply	Sustained
JJJ	Ralbo, Inc.	49541-	2		2,4		SJ	FFP	Navy	Supply	Summary
KKK	Ellis-Don Construction, Inc.	51208	6,8	1,4	10			FFP	Dept HHS	Construction	Split
LLL	Page Construction Co.	50816	4,6		4,6,7			FFP	Air Force	Construction	Denied
MMM	The Swanson Group, Inc.	47675	1,6		1,6,8			D.O.	Navy	Service	Split
NNN	Ellis-Don Construction	51029	4,8	1,6				FFP	Dept HHS	Construction	Sustained
OOO	Speedy Food Service, Inc.	51892	1	5	4,6,7		SJ	FFP	Air Force	Services	Summary
PPP	C.G. Williams Construction,	51329	3,4,9	1,2			SJ	FFP	Army	Construction	Summary
QQQ	Essex Electro Engineers,	49915	1,3	1,3				NS	Marine	Supply	Split
RRR	Hercules Construction Corp.	51296	3,8	1			SJ	FFP	Corps of	Construction	Summary
SSS	Kelso Painting Company	47639	1,3,8,9	1,8,,10	1,2,6,8	S		FFP	Air Force	Services	Split
TTT	Industrial Steel, Inc.	50754	7	1				FFP	NASA	Construction	Sustained
UUU	A.D. Roe company, INC.	48782	4,13	6	3		SJ	FFP	Navy	Construction	Summary
VVV	B.R. Services	47673	2,13		2,3,4,10	S		FFP	Dept State	Construction	Denied
WW	Compnia de Asusoria	52047	11		5			NS	Army	Not Specif.	Dismissed
XXX	Radar Devices, INC.	43912	2	6,8		G	R	NS	Army	Supply	Sustained
YYY	Certified Abatement	39852	1,6	6				D.O.	Navy	Services	Sustained
ZZZ	TRC Mariah Associates,	51811	5,16	2	1			D.O.	C.O. Eng	Services	Sustained
AAB	Donohoe Construction Co.	47310	3,8,9		1,2		R	FFP	Dept HHS	Construction	Denied
001	JSA Health Care	48262	12	12				D.O.	Army	Services	Sustained
002	Ellis-Don Construction	51029	3		5			FFP	Dept HHS	Construction	Summary
003	Thompson Areospace, Inc	51548	7		9			D.O.	Air Force	Not specif.	Dismissed
004	Ellis-Don Construction	50750	3	4	1			FFP	Dept HHS	Construction	Denied
005	Technocratia	46567	9	9,11	2			FFP	Navy	Construction	Denied
006	Technocratia	48031	17	2,4				FFP	Navy	Construction	Sustained
007	Technocratia	48439	3,4,8	1	1			FFP	Navy	Construction	Split
008	Technocratia	48924	17	2	10			FFP	Navy	Construction	Split
009	Wimsco	51844	6	10				D.O.	Air Force	Service	Sustained
010	Rex Systems, Inc.	49502	R				R	NS	DLA	Supply	Denied
011	Emerald Corp., Ltd.	51533	2		3			FFP	Air Force	Supply	Denied
012	UA Anderson Construction	48087	3,8	3		S		FFP	Air Force	Services	Sustained
013	Thomas Papathomas	51352	3,17	3,4	1			NS	Navy	Construction	Split
014	Mass. Microwave Tube	52020	2		9			D.O.	Navy	Supply	Dismissed
015	Ellis-Don Construction, Inc.	51210	13		10			FFP	Dept HHS	Construction	Denied
016	EROS, Div. of Resource Recy	49887	5	2	3		SJ	D.O.	DLA	Services	Summary
017	Coastal Government Services	50283	1	8			SJ	NS	Navy	Services	Summary
018	West Electronics, Inc.	34976	1,3		5		R	NS	Navy	Supply	Denied
019	Booth & Associates, Inc.	51914	7		4			D.O.	Air Force	Services	Denied
020	Alsace Industrial, Inc.	51708	16		2		R	P.O.	DLA	Supply	Denied
021	Alsace Industrial, Inc.	51709	16		2		R	P.O.	DLA	Supply	Denied

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No.	Case Name	Case No.	Dispute Cause	Govt weak	Contr. weak	SBA/ Govt	Ref.	Contr. Type	Branch of Service	Type of Reqt.	Court Decision
022	Cortez III Service, Inc.	51744	19	2,4				CPAF	NASA	Services	Sustained
023	Alstons Manor, Inc.	51670	1,4		1,3,6			FFP	Navy	Construction	Denied
024	Earth Tech Industries, Ltd.	46450	4,8,13		2,4			FFP	Air Force	Construction	Split
025	Gensico Technology Corp.	49664	14		1		R	D.O.	Navy	Not specif.	Denied
026	Dae Shin Enterprises, Inc.	50533	2		1,2		SJ	NS	DLA	Supply	Summary
027	AEC Corporation						No Data			No Data	
028	Hill Construction, Corp.	49820	3,6		1,2			FFP	Navy	Construction	Denied
029	Mediix Interactive	43961	5	7	8			CPFF	Health, Ed,	Services	Split
030	Sawyer Tree Company	50545	6		2			P.O.	Air Force	Services	Denied
031	C.T. Builders	51615	1	1,2,4				NS	Air Force	Construction	Sustained
032	D0-Well Machine Shop, Inc.	34565	2	9,11	2,4,6,10	S		FFP	Air Force	Supply	Denied
033	Lockheed Martin Corp.	45719	1		3		SJ	FFP	DLA	Supply	Summary
034	Ellis-Don Construction, Inc.	50430	1,4	1				FFP	Dept HHS	Construction	Sustained
035	Ordinance Devices, Inc.	42709	21		1			FFP	Navy	Supply	Denied
036	Sentara Health Systems	51540	21		7			NS	Navy	Service	Denied
037	MMC Construction	50863-	19	10			SJ	FFP	C.O. Eng	Construction	Summary
038	EROS Dis. of Resource Recy	48355	R		1,7		R	D.O.	Air Force	Service	Denied
039	Intelligence Systems Services,	51017	6		5			P.O.	Air Force	Service	Dismissed
040	Smith of Galetton Gloves, Inc.	50580	1,4	1				FFP	DLA	Supply	Sustained
041	MA Mortenson Co.	50716	1,4		7			FFP	C.O.Eng.	Construction	Denied
042	McDonnell-Douglas Helicopter	50447	10		4		SJ	BOA	Army	Supply	Summary
043	H.E. Johnson, Inc.	42248	7					FFP	Navy	Not specif.	Sustained
044	MA Mortenson Co.	50605	4	1				FFP	C.O. Eng	Construction	Sustained
045	MA Mortenson Co.	51241	1	5				FFP	C.O. Eng	Construction	Sustained
046	McDonnell-Douglas Helicopter	50448	10		4		SJ	BOA	Army	Supply	Summary
047	McDonnell-Douglas Helicopter	50449	10		4		SJ	BOA	Army	Supply	Summary
048	JA Jones Mgmt Services	46793	20		1			NS	Air Force	Service	Denied
049	AEC Corp, Inc.	45713	7					NS	Air Force	No specif.	Sustained
050	Encorp Intl, Inc.	49474	17	2	7			FFP	C.O. Eng	Construction	Split
051	Omega Enviornmental, Inc.	51639	22	2			SJ	NS	Navy	Service	Summary
052	Ideal Electronic Security Co.	49547	7	2		S		D.O.	Army	Service	Sustained
053	Thompson Aerospace, Inc.	51548	15	2				D.O.	Air Force	Service	Sustained
054	Winter Harbor Water Co.	50963	7				R	NS	Navy	Not specif.	Denied
055/	Alsac Industrial, Inc	51709	16		2			P.O.	DLA	Supply	Denied
057	Essex Electro Engineers, Inc.	49916	1,3,4	5	1,8			NS	Marine	Supply	Split
058	EFG Associates	50546	5	4	5,9,10	S		D.O.	Air Force	Service	Dismissed
059	Electro Methods, Inc.	50215	2		1,2			FFP	Air Force	Supply	Denied
060	Cal High Tech. Inc.	50773	2	5	2	S	SJ	FFP	Air Force	Supply	Summary
061	Pacific Ship Repair &	49288	4		1			J.O.	Navy	Service	Denied
062	Radar Devices, Inc.	43922	2	8	2			D.O.	Army	Supply	Sustained
063	Marine Desighn Technologies	43142	14	10	4			CPFF	Navy	Service	Sustained
064	Alsac Industrial, Inc	51708	16		2			P.O.	DLA	Supply	Denied
065	Voices R' Us	51565	15	4				NS	Navy	Not specif.	Dismissed
066	All Star / SAB Pacific	50856	19		1		R	NS	Navy	Not specif.	Denied
067	Kaiser Marquardt	49800	4		3			BOA	Navy	Supply	Denied
068	Kaiser Marquardt	50177	4		3			CPFF/FPI	Navy	Supply	Dismissed
069	Atlantc Drydock	42679	4	3			R	FFP	Navy	Service	Denied
070	L&H Construction Co., Inc.	50306	20		4,6,7		SJ	NS	C.O. Eng	Construction	Summary

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No.	Case Name	Case No.	Dispute Cause	Govt weak	Contr. weak	SBA/ Govt	Ref.	Contr. Type	Branch of Service	Type of Reqt.	Court Decision
071	McDonnell-Douglas Corp.	46266	18		4			NS	Navy	Not specif.	Not specif.
072	EROS Division of Resource	48355	5,12,17	2				D.O.	DLA	Service	Denied
073	Chem-Tile Environmental	39620	4	1	5	S		FFP	DLA	Service	Sustained
074	Winter Harbor Water Co.	50963	7		5			NS	Navy	Not specif.	Dismissed
075	McElroy Machine & Mfr	46477	1		1			FFP	Navy	Supply	Denied
076	Rex Systems, Inc.	49502	5	4			SJ	FFP	Army	Supply	Summary
077	Applied Communications		2					NS	Army	Supply	Denied
078	M. Raina Associates, Inc.	50486	3,8		1			FFP	Navy	Construction	Denied
079	Deval Corporation	47132	4,5	1	1			D.O.	Navy	Service	Denied
080	Jay Automotive Specialties,	50036	5,14	5,12				NS	Army	Supply	Sustained
081	Moon Engineering Co, Inc.	49210	5		1,7			CPAF	Navy	Services	Denied
082	AEC Corporation	42920	2	2			R	NS	Navy	Construction	Sustained
083	Front Look Promotions, Inc.	50372	2		3			NS	Air Force	Service	Denied
084	McDonnell-Douglas Corp.	46266	12		4,7			NS	Navy	Supply	Split
085	Genisco Technology	49664	14	9,11	1,10			D.O.	Navy	Supply	Sustained
086	Applied Communication	49230	2	9	10			FFP	Army	Supply	Denied
087	Consolidated Construction,	46498	1,3,4,8,13	3,9	1,2			FFP	C.O. Eng	Construction	Split
088	Home Entertainment	50791	2,3	2				NS	Army	Service	Sustained
089	Voices R' Us	51026	R		1		R	NS	Navy	Reconsidera	Denied
090	California Consulting	50355	R		1		R	FFP	Army	Reconsidera	Denied
091	C Lawrence Construction Co	51432	R		5		R	NS	Army	Reconsidera	Dismissed
092	Vantage Associates, Inc.	51418	21		9			FFP	Navy	Supply	Dismissed
093	Holms & Narver, Inc.	51430	11	4				FFP	FAA	Service	Sustained
094	AM General Corp.	51107	10		4,7			FFP	Army	Supply	Denied
095	Home Entertainment	50920	11,12	8			SJ	P.O.	Navy	Supply	Summary
096	Boeing Defense & Space	51773	5		8			FFP/FPI	Air Force	Supply	Denied
097	Metric Constructors, Inc.	50843	5,11	10	9			NS	C.O. Eng	Construction	Denied
098	Senor Tenedor, S.A. de C.V.	48502	7				R	NS	Dept State	Not specif.	Sustained
099	All Seasons Construction &	45583	3,14	1				FFP	Air Force	Construction	Sustained
100	Hughs Moving & Storage	45660	9	7	3			D.O.	Army	Service	Split
101	TPI Intl, Airways, Inc.	46462	2		5		R	NS	Air Force	Service	Dismissed
102	Intl. Maintenance Resources	51443	1	3	7			NS	Army	Service	Denied
103	Taisei Rotec	50669	18		4			FFP	Navy	Not specif.	Denied
104	Sauer Inc.	39605	R		1		R	FFP	Navy	Construction	Denied
105	Balimoy Manufacturing	47140	5	9,11	1,2	S		FFP	Army	Supply	Denied
106	Aable Tank Services, Inc	51407	1,3	1	1,2,6			FFP	Navy	Construction	Split
107	Industrial Steel, Inc.	50754	3,14	7				FFP	NASA	Construction	Sustained
108	David Builders, Inc.	51262	9,13	3	2			FFP	Navy	Construction	Denied
109	Applied Ordnance Technology	51297/	2		2			FFP	Natl Imaging	Supply	Split
110	City of Albuquerque	49698	10	2				NS	Air Force	Service	Sustained
111	Mid Eastern Industries	51286	2		5			NS	Navy	Supply	Dismissed
112	Sham's Engineering &	50618	12		1			NS	Intl Dev.	Construction	Denied
113	C Lawrence Construction,	51432	1		3,4			FFP	C.O. Eng	Construction	Denied
114	Pipeline Construction, Inc.	50744	2		2,3			FFP	Army	Construction	Denied
115	Voices R' Us	51026/	R	7	3		R	FFP	Navy	Supply	Denied
116	JWA Emadel Enterprises	51016	6		4,8			CPFF	Air Force	Service	Denied
117	California Consulting	50355	4	1	1	S		FFP	Army	Service	Denied
118	Orbital Sciences Corp.	49250	5		1,4		R	NS	Air Force	Supply	Denied

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No.	Case Name	Case No.	Dispute Cause	Govt weak	Contr. weak	SBA/ Govt	Ref.	Contr. Type	Branch of Service	Type of Reqt.	Court Decision
119	Heritage Reporting Corp.	50173-	R	10	1		R	NS	Dept Labor	Services	Denied
120	Gardner Zemke Co.	51499	11	2				NS	Dept Energy	Construction	Sustained
121	Propellex Corp.	48680	18					NS	Navy	Not specif.	Not specif.
122	Leixab, S. A.	51581	15		5			D.O.	Army	Not specif.	Dismissed
123	Graham International	50434/	6	8	9			D.O.	Army	Service	Dismissed
124	J&J Oilfield & Electrical	46044	4,6	1				D.O.	Army	Service	Sustained
125	International Maint.	51443	11	2			SJ	D.O.	Army	Service	Summary
126	AEC Corporation	42920	2	7,8,9,1	2,3	S		FFP	Navy	Construction	Sustained
127	JWA Enterprises	51016	R		1		R	NS	Air Force	Not specif.	Denied
128	All Star / SAB Pacific J.V.	50856	19		6			D.O.	Navy	Service	Denied
129	Carolina Oil & Distributing Co.	48093	6		1			NS	Marine	Supply	Split
130	Home Entertainment Intl,	50920	6	8	1,5			P.O.	Navy	Service	Denied
131	Techplan Corporation	41470	7					NS	Navy	Not specif.	Sustained
132	Grumman Aerospace Corp.	46834	1	1			R	NS	Air Force	Supply	Sustained
133	Rex Systems, Inc.	50456	5,11	2			SJ	NS	Navy	Supply	Summary
134	RMS Technology, Inc.	50954	2		5		SJ	NS	Army	Not specif.	Summary
135	Sea Land Services, Inc.	46608	6,10	4,11	8			D.O.	Navy	Service	Sustained
136	Vegas Analytical Laboratories	50854	2		3,9	S		FFP	C.O. Eng	Service	Dismissed
137	Grumman Aerospace	48282	10	2				D.O.	Navy	Supply	Sustained
138	Turbine Aviation	51323	2,12	3,8				FFP	Air Force	Supply	Sustained
139	Copy Data Systems	44658	R		1		R	NS	Intl Dev.	Not specif.	Denied
140	Rex Systems	49065	3	5			R	NS	Navy	Construction	Sustained
141	Boeing Defense & Space	50048	5		1		R	NS	Air Force	Supply	Denied
142	Graham Intl.	50481	2,11,15		2,5			FFP	Army	Service	Dismissed
143	Central Environmental, Inc.	51086	5,11	4	3		SJ	NS	Air Force	Service	Summary
144	SAI Industries Corp.	51575	15		5			P.O.	Air Force	Supply	Dismissed
145	MCI Telecommunications	47552/	12	2				FFP	Navy	Service	Sustained
146	Mid-Eastern Industries, Inc.	51287	9,15		5			J.O.	Navy	Supply	Dismissed
147	Ellis-Don Construction, Inc.	51029	1,3,8	1,3,4	1			FFP	Dept HHS	Construction	Denied
148	Lanzen Fabricating, Inc.	40328	7		5			FFP	Navy	Not specif.	Denied
149	West Electronics, Inc.	34976	3	1	2,5,8			FFP	Navy	Supply	Denied
150	Nurse Works, Inc.	51263	1	1				FFP	Navy	Service	Sustained
151	Emerald Maintenance, Inc.	43929	3,4	2,4,10				FFP	Navy	Construction	Sustained
152	Kinetic Builders, Inc.	51012	4		2,4			FFP	Air Force	Construction	Denied
153	Kinetic Builders	51611	4		1			FFP	Air Force	Construction	Denied
154	Pizzagalli Construction	48317/	4	5	1,6			FFP	C.O. Eng	Construction	Denied
155	Skyline Technical	51076	4		1,4			FFP	Navy	Construction	Denied
156	Oscar Narvaez Venegas	49291	8		1,5		R	NS	Dept State	Construction	Denied
157	Electro Richter	51117	10	7	4			T/M	Army	Service	Denied
158	Bay Gulf Trading Co. Ltd.	51204	18		1,3			FFP	Marine	Supply	Denied
159	Carrol Automotive	50993	5,6	5,8				D.O.	Air Force	Supply	Sustained
160	Fre'nce Manufacturing Co.,	46233	2	9	2			FFP	DLA	Supply	Denied
161	H.E. Johnson Co., Inc.	50861	3	1	1			FFP	Navy	Construction	Sustained
162	U.S. General, Inc.	48528	7		5			NS	Navy	Not specif.	Dismissed
163	MCI Telecommunications	47552/	6	2			SJ	NS	Navy	Service	Summary
164	R.C. Construction Co. Inc.	51391	1		1			FFP	C.O. Eng	Construction	Denied
165	Industrial Data Link, Corp.	49348	R		5		R	NS	Air Force	Not specif.	Denied
166	Reflecstone, Inc.	42363	1,4		1,8			FPIF	Air Force	Supply	Denied

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167	Kentucky Building Maint. Inc.	50535	1		1,3			FFP	Air Force	Service	Denied
168	Kentucky Building Maint. Inc.	45275	1,3		1			FFP	Air Force	Service	Denied
169	Voices R' Us	49818	5		1			NS	Navy	Service	Denied
170	Schuepferling Gmbh & Co.	45567	11,12	5,12	4			FFP	Army	Service	Dismissed
171	Labelle Industries, Inc.	44201	5,7		2,3			FFP	Army	Not specif.	Denied
172	Triad Microsystems, Inc.	39478	22		10			NS	Navy	Service	Dismissed
173	American Gulf Companies	49919	9		2		SJ	NS	Intl Dev.	Service	Summary
174	D.E.W. Inc.	38392	7	6		G	R	NS	C.O. Eng	Service	Sustained
175	Fairchild Industries, Inc.	46197	1,6	10			SJ	NS	Air Force	Supply	Summary
176	Dee Scheppler	50369	2		5,8			NS	Air Force	Service	Dismissed
177	D.E.W. Inc.	50796	9	3,6		G	SJ	NS	C.O. Eng	Service	Summary
178	JWA Emadel Enterprises, Inc.	51016	3	4	5,8			CPFF	Air Force	Service	Dismissed
179	Saver Inc.	39605	3,8	1	1			FFP	Navy	Construction	Split
180	Boeing Defense & Space	50048	5	2				FPIF	Air Force	Supply	Sustained
181	Dillingham / ABB-Susa	51195/	3	3,4			SJ	FFP	C.O. Eng	Construction	Summary
182	TRS Research	50086	7	3,4,10				NS	Army	Service	Sustained
183	Alaska Mechanical, Inc.	50988	1	1,5			SJ	FFP	Air Force	Supply	Summary
184	La Belle Industries, Inc.	49307	2	1,9,11	1,2,3	S		FFP	Army	Supply	Sustained
185	Met-Pro Corp.	49694	4,8	1,4	6			FFP	C.O. Eng	Construction	Sustained
186	Dan G. Trawick, III	47779	4	1,5				FFP	Navy	Construction	Sustained
187	Industrial Data Link Corp.	49348	5	2			SJ	D.O.	Air Force	Supply	Summary
188	Structural Concepts, Inc.	48933	R		1		R	FFP	Navy	Construction	Denied
189	D.E.W. Inc.	46073	5,7		3			FFP	C.O. Eng	Construction	Denied
190	Grumman Aerospace Corp.	46834	1	1	3		SJ	FPIF	Air Force	Supply	Summary
191	Medi-Peth Medical	50113	2		2	S	SJ	D.O.	DLA	Supply	Summary
192	Martin Marietta Corp.	44812	6		6			FFP	Air Force	Supply	Denied
193	Martin Marietta Corp.	48223	R		1,8		R	NS	Air Force	Not specif.	Denied
194	W.G. Yates & Sons	47213	1		3			FFP	Army	Construction	Denied
195	Copy Data Systems, Inc.	44058	1		3,7			D.O.	Intl Dev.	Service	Denied
196	Schuepferling, Gmbh & Co.	45565	11,12	12	4			FFP	Army	Construction	Dismissed
197	D.E.W. Inc.	49735	2,9	4	3			FFP	C.O. Eng	Construction	Split
198	Decker & Company	41089	7	5,6				NS	Army	Not specif.	Sustained
199	Control Line	50235	6	10	3			D.O.	Army	Construction	Sustained
200	Asbestos Transportation	46263	R		1		R	FFP	Navy	Construction	Denied
201	Zenith Data Systems	49611	13		7			D.O.	Air Force	Supply	Denied
202	SAI Industries Corp	49161	1,2		2,3	S		P.O.	Air Force	Supply	Denied
203	SAI Industries Corp	49147	1,2,13		2,3	S		FFP	Air Force	Supply	Denied
204	Heritage Reporting Corp.	50173/	1	1	1			P.O.	Dept Labor	Service	Sustained
205	Systems & Electronics	48178	3,14	1				FFP	Army	Service	Sustained
206	Starhill Alternative Energy	49612/	2,9	3	1,8	S		NS	Air Force	Construction	Denied
207	Freedom, IY, Inc.	35671	7	6				NS	DLA	Supply	Sustained
208	Oscar Narvaez Venegas	49291	5	8,10	3			FFP	Dept State	Supply	Sustained
209	Intercontinental Manufacturing	48506	1		1			FFP	Army	Supply	Denied
210	Hughes Moving and Storage	45346	2	6,10	3			D.O.	Army	Service	Sustained
211	Newport News Shipbuilding	44731-	R		1		R	NS	Navy	Not specif.	Denied
212	M A Mortenson, Co.	40750-	R		8		R	FFP	C.O. Eng.	Construction	Denied
213	Scientific Management	50956	14	2	9			CPFF	Navy	Service	Denied
214	Nagy Enterprises	48815	2,9		1,2,4			FFP	C.O. Eng	Construction	Denied

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215	Ried Associates, Inc.	44633	7		5			FFP	Navy	Construction	Dismissed
216	W.G. Yates & Sons	49398/	18		1		SJ	FFP	Army	Construction	Summary
217	Jones Oil Co.	42651	2,12		1			NS	DLA	Supply	Denied
218	Northrop Worldwide Aircraft	45216/	5	1	10			CPAF	Army	Service	Sustained
219	Copy Data Systems, Inc.	44058	R	3			R	NS	Intl Dev.	Not specif.	Dismissed
220	Schuepferling GmbH & C., KG	45564	6,11,12	12	4,10			FFP	Army	Construction	Dismissed
221	Voices R'Us	51026	5		2			FFP	Navy	Supply	Denied
222	Atherton, Construction	48167	R		1		R	NS	Air Force	Construction	Denied
223	SAI Industries Corp	49149	2,13		2	S		FFP	Air Force	Supply	Denied
224	Stewart & Stevenson Services	43631	R		1		R	FFP	Army	Supply	Denied
225	Winter Harbor Water Co.	50963	6	2		G		NS	Navy	Service	Sustained
226	E. R. Mitchell Construction,	48745	3,14		1			FFP	Navy	Construction	Denied
227	Applied Technology Assoc.	49200	5	7,9,11	2	S		FFP	Navy	Service	Sustained
228	Home Entertainment, Inc.	50791	2	3,4			SJ	NS	Army	Service	Summary
229	Industrial Data Link Corp.	49348	5,15		5			FFP	Air Force	Supply	Denied
230	Lavelle Co.	504498	2	3	1,2			FFP	Air Force	Supply	Denied
231	Intercontinental Mfr, Co.	48506	3	1			SJ	FFP	Army	Supply	Summary
232	Agro-Lawn Systems, Inc.	49648	1,20	1	6			FFP	C.O. Eng	Service	Split
233	Grumman Aerospace Corp.	46834	3	1	7,9		SJ	FFP	Air Force	Supply	Summary
234	Grumman Aerospace Corp.	48006	3	1			SJ	FFP	Air Force	Supply	Summary
235	Martin Marietta Corp.	48223	10		4,6			FFP	Air Force	Supply	Split
236	An Jac Corp.	49983	2	3,9	2,10			P.O.	Navy	Construction	Denied
237	Richard Lobarto Remodeling	49968	2,19	6	8		SJ	D.O.	Army	Construction	Summary
238	Alsace Industries, Inc.		3,16	3	2			P.O.	DLA	Supply	Sustained
239	United technologies Corp/	43645	10		4			FFP	Air Force	Supply	Denied
240	Grumman Aerospace Corp.	46834	1,3	1,5			SJ	FFP	Air Force	Supply	Summary
241	L&M Thomas Concrete C., Inc	49198	2,9	1,10			SJ	NS	Air Force	Construction	Summary
242	Alvarez & Associates, Co.	49341	9	2	1,2			FFP	C.O. Eng	Construction	Denied
243	Arapaho Communications, Inc	48235	7	2	1			NS	Air Force	Construction	Sustained
244	Intl fidelity Insurance Co.	44256	9	2				FFP	Navy	Construction	Sustained
245	C.E.F.P. s.n.c.	49704	4	1,3	3,4			FFP	Navy	Construction	Denied
246	AAR Alen Group, Inc.	48900	10	6			SJ	FFP	NASA	Service	Summary
247	McDonnell-Douglas	50756	10		4,6		SJ	NS	Army	Supply	Summary
248	Commercial Energies, Inc.	50316	6,12	1,8				NS	Navy	Service	Sustained
249	Grumman Aerospace Corp.	46834	1,3	1			SJ	FPIF	Air Force	Supply	Summary
250	H K H Capitol Hotel Corp.	47575	1,4,12	11	1,4,9			D.O.	Air Force	Service	Denied
251	Ellis Construction C., Inc.	50091	3	1	4			D.O.	Air Force	Construction	Dismissed
252	Dante Calcagni	49903	2,9	2	4,6,7			FFP	Def Reutil	Supply	Dismissed
253	Fareast Service Company	50570-	2		1,3		R	D.O.	Marine	Supply	Denied
254	Valenzuela Engineering, Inc.	50019	13	1,2				FFP	NASA	Construction	Sustained
255	Teximara Corp.	50455	6,19		6		SJ	NS	Air Force	Service	Summary
256	Asbestos Transportation	46263	1,13	1	1			FFP	Navy	Service	Denied
257	Boro Developers, Inc.	48748	8		1		R	NS	Navy	Construction	Denied
258	McDonnell-Douglas Corp.	50592	R		9		R	NS	Army	Supply	Denied
259	Con-Seal, Inc.	41762	3,4	1	1			FFP	Navy	Construction	Split
260	Peter Gross GmbH & Co. KG	50326	8		3,9		SJ	FFP	Air Force	Service	Summary
261	Tri-Star Defense, Inc.	46650	2	3,5	1,2,10			FFP	Army	Supply	Denied
262	Asbestos Free, Inc.	50805	17		1,6			D.O.	Air Force	Service	Denied

APPENDIX G. SUMMARY OF ASBCA CASES ANALYZED

Appendix G is provided as a summary of the major aspects of each case analyzed.

Note: The list of case summaries analyzed during the research phase of this thesis is constructed in MS Excel and follow on pages 147 through 173.

Listed below are acronyms / abbreviations used within Appendix G in order to describe each case within the a space allotted.

Acronym/abbreviation:

- Addl	additional
- Ambig	ambiguous
- Assy	assembly
- Attny	attorney
- Bldg	building(s)
- Ckt	circuit
- CLIN	contract line item number
- Compl	complete
- Cond	condition
- CO	contracting officer
- COR	contracting officers' representative
- DHH	Department of Health and Human Services
- DoD	Department of Defense
- DoE	Department of Energy
- DoL	Department of Labor
- DO	delivery order
- Drwg	drawing
- EAJA	Equal Access to Justice Act
- Elex	electric/electronic
- Eq	equal
- GFE	Government furnished equipment
- GFP	Government furnished property
- Gnd	ground
- HHG	household goods
- Insp	inspection
- Jt	joint

- Jurisd	jurisdiction
- K	contract
- Ktr	contractor
- LD	liquidated damages
- Maint	maintenance
- Matl	material
- Mkt	market
- Natl	national
- Orig	original
- Ovhd	overhead
- Perf	performance
- Pkge	package
- PO	purchase order
- PWS	performance work statement
- Qty	quantity
- REA	request for equitable adjustment
- Reconsid	reconsideration
- Reg	regulation
- Repl	replace / replacement
- Reqt	requirement
- Rmvl	removal
- Sched	schedule
- Shbd	shipboard
- SOO	statement of objectives
- SOW	statement of work
- Subktr	subcontractor
- Sw	switch
- Sys	system
- Tgt	target
- Trng	training
- Upgr	upgrade
- VECp	value engineering change proposal
- Wpns	weapons
- Xfer	transfer

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No.	Case Name	Branch of Service	Type of Service	Reasons for Dispute / Claim	Boards Decision	Weaknesses Identified
AAA	L.C. Laskins Construction, Inc.	Air Force	Construction	Govt - Liq. damages (LD) for 169 day delay. Ktr - Request for equitable adj.	Denied	Ktr - Claimed defective specs (implied warranty) Lack of evidence that specs caused out of spec. product or that Govt caused delays.
BBB	The Ryan Company	Navy	Service	Govt directed changes + K delays.	Summary Judgment (Denied)	Ktr - Elec. Sw. Gear not to K specifications.
			Repl. elec. sw. gear	Govt motion - partial summary judgment.	Denied	Govt - Insp. of sw. gear K language not clear.
CCC	AAA Engineering & Drafting Inc.	Air Force	Services	Govt changes, inadequate GFP, excessive Govt prioritization.	Denied	Ktr- Claim did not request COFD. No valid cert.
			Visual Info Services	Govt motion to dismiss - lack of jurisdiction.		Govt - Slow to issue COFD
DDD	Hitt Contracting, Inc.	Navy	Services	Ktr directed to perform work outside scope of work.	Split	Denied - COFD must be issued first.
			Housing repairs			Sustained- Statement of facts not disputed, addl leaking plumbing + door repairs directed.
EEE	Senatra Health	Navy	Services	Compensation for Govt use of VECP.	Denied	Govt - Failed to prove Ktr's software record keeping system did not result in cost savings.
			Health records	Govt motion for Reconsider of previous decis.		
FFF	United Technologies Corp/Pratt & Whitney	Air Force	Supply	Defective cost/pricing data under TINA.	Summary Judgment (Denied)	Govt- Lack of monitoring, failed to obtain data during previous K years 1986-90.
			Jet engines	Govt motion to dismiss / partial sum judge.		Ktr - Failed to state a claim against Govt.
GGG	Kirk/Marsland Advertising, Inc. (SBA)	Dept HHS	Service	Govt - Accused of "bad faith" for not exercising K option year 2. Seeking anticipated profits.	Summary Judgment (Denied)	Ktr - Lack of proof of bad faith, poor Ktr judgment.
			Nurse recruitment	Govt motion for summary judgment.		
HHH	Mediatrix Interactive Technologies, Inc.	Dept HHS	Supply	Ktr requests interest on awarded amount.	Denied	Govt - Must use 1991 claim due to first official notice of a certified claim as p/o T4C proposal.
				Govt motion for reconsideration of previous sustained appeal.	Reconsid.	Lack of proof otherwise.
III	Nomura Enterprise, Inc.	Army	Supply	Unabsorbed ovhd for continuing a partially terminated K. New order qty decrease from 1,033ea to 714ea.	Sustained for \$9562	Govt - Stop work order issued because of bid protest (Govt caused delay) due to bid protest.
			Gun barrels (1,747ea)			
JJJ	Ralbo, Inc.	Navy	Supply	T4D - Ktr failure to deliver first article.	Summary Judgment (Denied)	Ktr - Falsely certified it had never defaulted on a Govt K in past 3 years. Failed to deliver valves on schedule. Govt has right to T4D (false cert.).
			Fluid reg. valves	Govt motion for summary judgment.	Split	Sustained - Ktr costs of off-site rental space.
KKK	Ellis-Don Construction, Inc.	Health & Human Se	Construction	CO denial of claim for off-site storage of construction mats due to differing site.		Denied - Costs of fencing/protecting materials. Differing site conditions (soil contamination).
			Medical buildings			

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No.	Case Name	Branch of Service	Type of Service	Reasons for Dispute / Claim	Boards Decision	Weaknesses Identified
LLL	Page Construction Co.	Air Force	Construction Fire Station	REA - Install of 4" sewer piping to main 100' away vise 5' as estimated (no site survey).	Denied	Govt - Sewer main not in orig K documents. Ktr - However, Ktr did not conduct a proper site survey to clarify ambiguity.
MMM	The Swanson Group, Inc.	Navy	Service Security Guards/ Roving Patrols	REA - Excessive costs incurred by Ktr including vehicle replacement, maint, gasoline, training.	Split	Sustained - Costs for escort munitions training. Denied - All other claimed costs. Poor financial mgmt. Failed to prove Govt as cause of costs.
NNN	Ellis-Don Construction	Dept HHS	Construction Med. Builds / Facility	Ktr claim for differing site conditions.	Sustained	Govt - Failed to prove subsurface soil was not contaminated with peat moss.
OOO	Speedy Food Service, Inc.	Air Force	Services Full Food Service Op	Constructive changes in GFE required to be maintained by KTR. Cross motions for Summary Judgment Balance due on K close-out proposal. Alleged const changes, Govt delays. Cross Motions for Summary Judgment Defective Tech Data Page, GFP + Govt caused delays & disruptions. Appellant motion for reconsideration.	Summary Judgment (Denied) Summary Judgment (Denied) Split	Govt - Incomplete list of GFE. Ktr - Poor proposal. Should have known list was incomplete if proper site survey was performed. CO previously allowed offsets ... not familiar with K. Govt position not clear/inconsistent.
PPP	C.G. Williams Construction, Inc.	Army	Construction Building repairs			
QQQ	Essex Electro Engineers, Inc.	Marine Corps	Supply Flood light sets (91 ea)			
RRR	Hercules Construction Corp.	Corps of Engineers	Construction Renovation of Bldg. 121	Alleged damages for Govt disruption, delays, diff site cond, loss of efficiency. Govt motion for Summary Judgment.	Summary Judgment (Denied)	Sustained - Entitled to addl. 25 days. Denied - All other aspects due to Ktr concurrent delays. Govt - Guilty of directed changes through multiple modifications.
SSS	Kelso Painting Company	Air Force	Services Rmvl - Lead based paint	Govt - LD claim for 222 days delay completion. Ktr claims destructive winds, disruptive insp. practices (arbitrary & capricious), diff. site cond.	Split	Sustained - Rework of shroud + indust. hygentist. Denied - Appeal of bad faith, 216 day LD claim.
TTT	Industrial Steel, Inc.	NASA	Construction Legal fees	Altmy fees & expenses incurred in successful appeal.	Sustained	Ktr - No site survey, no plan for increment weather. Govt - Delay of 153 days access to job site due to NASA shuttle launches.
UUU	A.D. Roe company, INC.	Navy	Construction Removal - non-conform. valves	SubKtr claim thru Ktr for removal/replace-ment of non-conforming valves. Respondent motion or Summary Judgment.	Summary Judgment (Denied)	Ktr - Difficulty securing proper valves. Govt - Produced a "slender" evidence file, more data needed to make a judgment.
VVV	B.R... Services	State Dept	Construction Repair Embassy roof Katmandu, Nepal	T4D - Ktr failure to repair 800 sq ft roof, complete punch list, use of U/A mats, improper workmanship.	Denied	Ktr - Abandoned worksite 75% complete, not to K specs, use of unskilled labor, violation of customs laws.

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No.	Case Name	Branch of Type of Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
WW	Compnia de Asusoria	Army	Not specified	Dismissed	Ktr - Filed appeal in excess of 90 days (93 days) Board dismissed case. Recommended appealing to U.S. Court of Federal Claims.
XXX	Radar Devices, INC.	Army	Procurement Shipbd radio sets	Reconsid. Sustained	Govt - Arbitrarily refused to allow dlvy of 8 units even with informal agreement to give 10 addl. days. Sustained in favor of Ktr.
YYY	Certified Abatement technologies, Inc.	Navy	Services Asbestos removal	Sustained	Under bankruptcy law, certified claim can xfer from old corp. to new corp.
ZZZ	TRC Mariah Associates, Inc.	C.O. Eng (Army)	Services Multi-discipline environmental study	Sustained	Ktr - Close-out costs failed to establish reasonableness. Ktr rvc'd \$2,916 of the \$25,398 asked.
AAB	Donohue Construction Co.	Dept HHS	Construction Various buildings	Denied	Ktr - Failure to meet element of proof that Govt was responsible for 103 day delay.
001	JSA Health Care	Army	Services Health care service	Sustained	Govt - Failure/refusal to disclose the number of current Primus clinic users.
002	Ellis-Don Construction	Dept HHS	Construction Comp. for 107 day delay	Denied	Ktr - Proven to have had concurrent delays.
003	Thompson Aerospace, Inc	Air Force	Not specified	Dismissed	Ktr - Premature application. Dismissed by Board.
004	Ellis-Don Construction	Dept HHS	Construction various construction	Denied	Ktr - Not allowed mark-ups on SubKtr claim. Govt - Untimely COFD / unmonitored Ktr.
005	Technocratia	Navy	Construction Electrical upgrades	Denied	Ktr - Failure to stay on schedule - 183 days late.
006	Technocratia	Navy	Construction Performance guarantee	Sustained	Govt - CO unlawfully held Perf. Bond stating it might be used to offset compl. costs.

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No.	Case Name	Branch of Service	Type of Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
007	Technocratia	Navy	Construction Fire/Crash vehicle shelter	Denied - base access delays. Sustained - constructive changes.	Split	Ktr - Failed to prove unreasonable delays Govt - Informally directed addl. work.
008	Technocratia	Navy	Construction Kangaroo Park, NSA	Denied - differing site conditions. Sustained - CO failure to rtn Perf. Guarantee. Denied - Ktr claims non-receipt of payment #5	Split	Ktr - Failed to provide evidence of changes. Govt - CO not familiar w/ terms of K. Ktr - Lack of internal communications.
009	Wimco	Air Force	Repair Service Irrigation sys./ grounds maintenance	Govt w/holding of final payment.	Sustained	Govt - Lack of authority to w/hold. Govt failed to provide list of discrepancies for correction.
010	Rex Systems, Inc.	DLA	Supply Production Mats	Appellant judged not entitled to recover int. on amt's paid in settlement of T4C.	Denied	Ktr - Parties had not reached an impasse w/ respect to a termination settlement.
011	Emerald Corp., Ltd.	Air Force	Supply Chock / securing blocks	Appeal of a T4D decision.	Denied	Ktr - Numerous deviations from specifications. First article samples unacceptable.
012	UA Anderson Construction	Air Force	Services Repair underground gas lines	Claim for costs incurred during work stoppage of K (diff site cond.) underground gas mains/lines.	Sustained	Govt - Lack of timely CO action (making change orders).
013	Thomas Papathomas	Navy	Construction Upgrade berthing / site improvements	Govt delays in providing dwrgs, specs, availability of bldgs, approval of A/C units.	Split	Sustained - Salary of Gen. Mgr + perf. Bond. Denied - Salary of other workers, insurance, airline tickets, car rental.
014	Mass. Microwave Tube & Device Company	Navy	Supply Electron tubes / devices	Protest COFD for T4D and costs incurred in K for Electronic tubes / devices.	Dismissed	Ktr - Claim premature. Should appeal for a T4C and claim for a monetary refund.
015	Ellis-Don Construction, Inc.	Dept HHS	Construction Change of brick pattern	Brick supplier change and brick pattern change on the part of the Ktr.	Denied	Ktr - Breakdown in communications. Change orders not specific and in writing.
016	EROS, Div. of Resource Recy	DLA	Services B-52 salvage services	Salvage of B-52 aircraft. Performance of all specified services in question.	Summary Judgment (Denied)	Ktr - Service not to specifications in SOW.
017	Coastal Government Services	Navy	Services Ambulatory healthcare	Govt alleged breach of implied contractual duties. Govt motion for Summary Judgment.	Summary Judgment (Denied)	Govt - Hindered Ktr. Circulated rumors of replacing Ktr employees with active duty pers. Caused Ktr pers. to seek other employment.

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No.	Case Name	Branch of Service	Type of Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
018	West Electronics, Inc.	Navy	Supply	Govt delays caused by specification errors and finalizing design of RDT units.	Denied	Ktr - Failed to make a timely REA. Wanted progress payments instead.
019	Booth & Associates, Inc.	Air Force	Services Drafting Design Services	Ktr requests reimbursement for legal fee's/ other costs to prevent reconciliation of appellant's K.	Denied	Ktr - Should have used use better judgment in hiring attorneys and incurring non-reimbursable costs.
020	Alsace Industrial, Inc.	DLA	Supply 184ea output couplers	Govt requested no-cost cancellation.	Denied	Ktr - Failure to deliver output couplers by extended delivery date.
021	Alsace Industrial, Inc.	DLA	Supply 164ea output couplers	Govt requested no-cost cancellation.	Denied	Ktr - Failure to deliver output couplers by extended delivery date.
022	Cortez III Service, Inc.	NASA	Services Support security	SubKtr claiming entitlement to premium pay during Federal shutdown. (Binding Arbitration attempted)	Sustained	Govt - Untimely COFD, CO not familiar w/ terms of the K.
023	Alstons Manor, Inc.	Navy	Construction Install of backflow preventers	Construction not to specification. Insulation on piping + sod, clean-up, repair of grnds not done.	Denied	Ktr - Poorly est. proposal. Failed to meet burden of proof. K not performed to specs.
024	Earth Tech Industries, Ltd.	Air Force	Construction Concrete pad to taxiway for F-111's	Ktr claim for closure of quarries, accel of work, differing site conditions, repairs of cracks in runways.	Split	Sustained - Repairs to cracked pavement. Sustained - Differing site conditions. Denied - Closure of quarries (matl unavail.). Denied - Acceleration of work.
025	Gensico Technology Corp.	Navy	Not specified Unabsorbed ovhd	Ktr requests reconsideration of previous denial for unabsorbed overhead.	Denied	Ktr - Seriously incomplete financial data. Has not shown new evidence or legal theories.
026	Dae Shin Enterprises, Inc.	DLA	Supply Projectile forgings	Ktr requests T4D change to T4C due to alleged Govt interference. Motion for Summary Judgment	Summary Judgment (Denied)	Ktr - Could not prove Govt caused Ktr to fail timely divy by interfering with SubKtr P.O.
027		-----	No Data	LEXIS and ASBCA unable to drawdown	-----	
028	Hill Construction, Corp.	Navy	Construction Repair of rescue facil.	Ktr - Daily profit computation - seeking lost profits.	Denied	Ktr - No proof provided that K was impossible to perform.

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No.	Case Name	Branch of Type of Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
029	Mediatrix Interactive Technologies, Inc.	Health, Ed, Services & Welfare	T4C - Termination of K & claim to recover unallowable costs paid to Ktr.	Split	Sustained - Direct Labor allowed (\$91,343) Denied - Indirect cost (Fringe, O/H, G&A). Govt - Better K monitoring required.
030	Sawyer Tree Company	Air Force	Ktr felled trees around runway. Wanted access to harvest timber for further profit - not allowed under K modification.	Denied	Ktr - Misunderstood K. Unable to harvest trees due also to wet conditions/undependable labor.
031	C.T. Builders	Air Force	Ktr claim for addl costs incurred while repairing unit 648 and remission of liquidated damages.	Sustained	Govt - Changed design specs (implied warranty) Govt - Other than CO making LD agreements + job delayed (Govt placed job on hold).
032	DO-Well Machine Shop, Inc.	Air Force	Ktr appeal T4D.	Denied	Ktr - Failed to meet divy sched due to inefficient shop practices/capabilities. Govt - Conduct better past performance checks.
033	Lockheed Martin Corp.	DLA	Alleged defective GFP - Target Data Packages. Ktr requests total cost recovery.	Summary Judgment (Denied)	Ktr - No CoFD on record. Needed for an appeal.
034	Ellis-Don Construction, Inc.	Dept HHS	Request for Summary Judgment Ktr alleges matl required by Govt in excess of specification - constructive change.	Sustained	Govt - Used drawing as priority over spec. Govt - Not familiar with K specs.
035	Ordnance Devices, Inc.	Navy	Denial of appellants claim for royalties from it's VECP data package.	Denied	Ktr - No exceptional/extraordinary circumstances to allow compensation for the VECP.
036	Sentara Health Systems	Navy	Ktr request for shared savings on VECP to integrate ambulatory care software into the U.S. Navy's software program.	Denied	Ktr - Weak argument for forcing payment on a VECP. Ktr did not fully understand the K.
037	MMC Construction	C.O. Eng (Army)	Govt withheld contract payments as directed by DoL. Case is only about jurisdiction. Motion to dismiss.	Motion to Dismiss (Denied)	Ruling - ASBCA does have the right to entertain these cases.
038	EROS Div. of Resource	Air Force	Ktr motion for reconsideration of 31 Dec 98 ruling. Ktr alleged CO would "never allow EROS to perform K."	Denied	Ktr - Lack of legal evidence to back up allegation.
039	Intelligence Systems Services, Inc.	Air Force	Ktr seeks payments under two P.O.'s for x-ray machine maintenance.	Denied	Ktr - Failure to respond to Board orders, abandoned appeal process.

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No.	Case Name	Branch of Service	Type of Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
040	Smith of Galetton Gloves, Inc.	DLA	Supply 30,360 pr gloves	Govt imposed add'l testing reqts & changed K requirements for colorfastness. Ktr had to buy more expensive matl to comply w/ reqts. Ktr claim that drawings were defective.	Sustained	Govt - CO added add'l specs to existing K w/out offering adj. Previous bidders informed CO that colorfastness was problem. Ktr - Didn't seek pre-bid clarification, omitted patent (easy to see) defects.
041	MA Mortenson Co.	C.O. Eng.	Construction Medical facility		Denied	
042	McDonnell-Douglas Helicopter Army		Supply Spares - AH-64	Defective pricing - CO seeking recovery under TINA.	Summary Judgment (Denied)	Ktr - Failure to provide complete & accurate cost/pricing data for several aircraft spares.
043	H.E. Johnson, Inc.	Navy	Eq. Access to Justice Act Attny fee's/expenses	Ktr seeks attorney fee's and expenses incurred in the successful appeal.	Sustained	Ktr won however, claim for \$40,779 was excessive.
044	MA Mortenson Co.	C.O. Eng (Army)	Construction Addl. Tests (weld insp)	Govt directed Ktr to inspect welds pursuant to a design specification.	Sustained	Govt - Directed a change in testing which was not part of the existing K.
045	MA Mortenson Co.	C.O. Eng (Army)	Construction Medical Facility	Ktr claim for leveling/shiving strut attachments.	Sustained	Govt - Drawings defective, specification problems, omitted details.
046	McDonnell-Douglas Helicopter Army		Supply Spares - assy's	Ktr failed to disclose more current purchase history which had become available prior to the date of certification.	Summary Judgment (Denied)	Govt - Insure drawings/specs are complete. Ktr - Failed to disclose complete purchase history data on several of it's higher priced aircraft spares (1,313ea strap assys).
047	McDonnell-Douglas Helicopter Army		Supply AH-64 - rotor assy's	Ktr failed to disclose more current purchase history which had become available prior to the date of certification.	Summary Judgment (Denied)	Ktr - Failed to disclose complete purchase history data on several of it's higher priced aircraft spares (61rotor head assys).
048	JA Jones Mgmt Services Inc.	Air Force	Service Gnd support eq. maint	Alleged negligent Govt solicitation.	Denied	Ktr - Failed me meet burden of proof.
049	AEC Corp, Inc.	Air Force	Eq. Access to Justice Act Attny fee's/expenses	Appellant seeks attorney's fee's and other expenses pursuant to EAJA for previous successful appeal.	Sustained	Note: Ktr must appeal w/in 30 days of notification of successful appeal.
050	Encorp Intl, Inc.	C.O. Eng (Army)	Construction Project in Bahrain	Ktr claims entitled to breach of K damages of \$92,877 or release of payment bond.	Split	Sustained - Reform K. Denied - Ktr may not recover damages per Miller Act. Govt must hold bond until SubKtrs are paid.

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No.	Case Name	Branch of Service	Type of Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
051	Omega Environmental, Inc.	Navy	Service Govt motion to dismiss	Govt motion to dismiss appeal on grounds appellant has no legal standing.	Govt motion (Denied)	Govt - Failed to recognize appellant as a legal entity. Must review req'ts of what constitutes a legal entity.
052	Ideal Electronic Security Co.	Army	Service (EAJA) Replace PCB x-formers	Appellant seeks attorney's fee's and other expenses pursuant to EAJA for previous successful appeal.	Sustained	Note: Ktr must appeal w/in 30 days of notification of successful appeal.
053	Thompson Aerospace, Inc.	Air Force	Service	Govt motion to dismiss appeal on grounds that appeal was untimely.	Sustained	Govt - Lack of familiarity with rules of evidence.
054	Winter Harbor Water Co.	Navy	Eq. Access to Justice Act Attny fee's/expenses	Appellant seeks attorney's fee's and other expenses pursuant to EAJA. Reconsideration.	Denied	Note: Ktr must appeal w/in 30 days of notification of successful appeal.
055/ 056	Alsac Industrial, Inc	DLA	Supply 164ea output couplers	Ktr appeal of COFD denying reinstatement of a lapsed P.O. + costs incurred in performance.	Denied	Ktr - Failure to deliver on schedule. Foundry & pattern delays after second extension. Govt - Improper K monitoring.
057	Essex Electro Engineers, Inc.	Marine Corps	Supply 91ea Flood light sets	Ktr claim for increased costs by Govt directed revisions. Defective tech data, defective/late GFE, Govt caused delay/disruption.	Split	Denied - Delay/disruption as concurrent w/ Ktr. Denied - Claim for interest (not a proper claim). Sustained - Costs for defective GFE.
058	EFG Associates	Air Force	Service Maint/repair/minor const	T4C requested by Ktr due to low vol of work. T4C also requested by Govt.	Dismissed	Premature claim.
059	Electro Methods, Inc.	Air Force	Supply 16ea case assy's for TF-33-100 jet engine	T4D - Govt would not waive divy schedule.	Denied	Ktr - Extended divy date due to vendor problems. Ktr - Lack of proof it performed 224 hrs on K. Govt - Market research needed for reliable Ktr.
060	Cal High Tech. Inc.	Air Force	Supply B-1B slat assy's	T4D - Alleged anticipatory repudiation of K requirement. Motion for Summary Judgment.	Summary Judgment (Denied)	Ktr - Failure to perform/start work. Ktr - Not equipped, failed to cure condition.
061	Pacific Ship Repair & Fabrication, Inc.	Navy	Service Repair USS Nimitz	Constructive changes alleged by Govt via cumulative change orders.	Denied	Govt - Bad mkt research/past performance checks. Ktr - Lack of proof that 23 bilateral J.O. mods did not equitably adjust 31 change orders.
062	Radar Devices, Inc.	Army	Supply INMARSAT receivers	Ktr appeal to COs T4D decision.	Sustained	Govt - Need better communications w/ Ktr. Govt - CO arbitrary & capricious. Should make clear (in writing) when a T4D or schedule revision will take place.

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No.	Case Name	Branch of Service	Type of Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
063	Marine Design Technologies Inc.	Navy	Service Technical services	Final overhead rates higher than Ktr's billing rates used during K - verified by DCAA	Sustained	Ktr - Poor billing practices.
064	Alsac Industrial, Inc	DLA	Supply 184ea output couplers	Ktr appeal of COFD denying reinstatement of lapsed unilateral P.O.	Denied	Ktr - Failed to deliver on time. Govt chose not to extend for third time.
065	Voices R' Us	Navy	Not specified	CO unilateral "no cost" settlement determination on a T4C.	Dismissed	Govt - Timely COFD needed to terminate. Case dismissed until hearing is held.
066	All Star / SAB Pacific	Navy	Misc Reimburse excise tax	Ktr appeal for increase in general excise tax for State of Hawaii and for wage rate increases. Reconsideration of previous denial.	Denied	Ktr - Failed to prove Board committed a legal error or that Board's findings were unsupported.
067	Kaiser Marquardt	Navy	Supply Aerial refueling sys repair	SubKtr appeal for failure investigation costs incurred and for constructive changes.	Denied	Ktr - Lack of proof that changes (constructive) occurred.
068	Kaiser Marquardt	Navy	Supply Design, dev, mfr 100 Aerial Refueling sys's	SubKtr appeal. Aerial Refueling Sys (ARS) reliability problems. Constructive changes associated w/ high failure rate.	Dismissed	Ktr - Lack of jurisdiction (privity of K) Govt - w/holding payments to prime Ktr.
069	Atlantic Dry-dock	Navy	Service USS Sim - Growth overhaul work in machinery spaces	Navy motion for reconsideration on cumulative disruption. Exceeded limits under change order clause.	Denied	Govt - Failure to issue work orders in a timely and orderly fashion.
070	L&H Construction Co., Inc.	C.O. Eng (Army)	Construction Upgrade elec. distribution	Ktr appeal that Govt failed to deliver disputed drawings E45-R52 to bidders. Cross motions for Summary Judgment. Refer to 7 Dec 98 decision.	Summary Judgment (Denied) Not specified	Govt - Late notification of add'l dwgs / bad solicitation preparation. Ktr - Should have inquired earlier about dwgs. Clarified the business clearance memorandum meeting attendees.
071	McDonnell-Douglas Corp. (errata)	Navy	Misc specified business clear. Memo attendees	Ktr appeal of T4C / wished to continue B-52 salvage operations.	Denied	Govt - Procedural errors in K award. Govt - CO unfamiliar w/ K terms.
072	EROS Division of Resource Recycling Intl, Inc.	DLA	Service Salvage of B-52 for scrape	Ktr appeal for addl expenses incurred due to constructive change to SOW.	Sustained	Govt - CO failure to obtain competition/use CBD. Govt - CO directed a constructive change to the K.
073	Chem-Tile Environmental Services, Inc.	DLA	Service HAZMAT Removal			

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No.	Case Name	Branch of Type of Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
074	Winter Harbor Water Co.	Navy	Eq. Access to Justice Act Attney fee's/expenses	Dismissed	Ktr - Untimely EAJA application. Must be submitted w/in 30 days of final decision. Dismissed due to lack of Board jurisdiction.
075	McElroy Machine & Mfr Co., Inc.	Navy	Supply 2ea 30Klb winches 2ea 150Klb winches	Denied	Ktr - Failed to prove commercial impracticability or economic hardship.
076	Rex Systems, Inc.	Army	Supply 50ea compute. mem assy	Summary Judgment (Denied)	Govt - Untimely COFD. Ktr - Failed to reach an impasse.
077	Applied Communications Research, Inc.	Army	Supply Miniature video xceivers	Denied	Ktr - Personnel problems w/in Ktr organization. Loss of expertise.
078	M. Riana Associates, Inc.	Navy	Construction Renovation work	Denied	Govt - Poor past performance checks. Ktr - Lack of proof project delayed 27 days due to new location of electrical panel.
079	Deval Corporation	Navy	Service Ovhl of armament equip.	Denied	Ktr - Lack of sufficient financial data upon which to make a reliable calculation. Ktr should keep better records.
080	Jay Automotive Specialties, Inc.	Army	Supply Vehicle / equip parts	Sustained for \$49.5K	Govt - Lack of K monitoring. Govt should honor specs in each K. Use of IMPAC card in no excuse for buying from non-agreed upon source.
081	Moon Engineering Co, Inc.	Navy	Services Phased maint on 3 US ships	Denied	Ktr - Incurred costs "during" stop work order, not familiar w/ K terms.
082	AEC Corporation	Navy	Construction Installation of a fire loop	Sustained	Govt - Appeal denied (sustained in favor of Ktr) Govt - No new evidence. CO had no valid K completion date.
083	Front Look Promotions, Inc.	Air Force	Service Consessionare service	Denied	Ktr. Serious health risk posed by Ktr due to unsanitary food handling. Ktr did not comply with K specs or guidelines.
084	McDonnell-Douglas Corp.	Navy	Supply Trade in older DC-9-31's for rehabbed DC-9-33's	Split	Sustained - Navy bring A/C back to USN spec. Denied - Bring A/C back to FAA spec. Ktr - Misunderstood K, poor judgment/insp.

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No.	Case Name	Branch of Service	Type of Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
085	Genisco Technology	Navy	Supply	Ktr appeal of CO denial of certain increased mail costs & unabsorbed overhead of \$1.1M.	Sustained for \$1,337	Ktr - Financial data seriously incomplete.
086	Applied Communication Research, Inc.	Army	Ruggedized computer work stations Supply Miniature video xceivers	Ktr appeal of T4D for failure to deliver units by delivery date.	Denied	Ktr - Personnel problems w/in Ktr organization. Loss of expertise.
087	Consolidated Construction, Inc.	C.O. Eng (Army)	Construction Taxiway/airfield work	Ktr claim for differing site conditions, changes and compensatable delays, fuel tax increase.	Split	Govt - Poor past performance checks. Sustained - Fuel tax increase, denied all other. Ktr - Behind schedule, no proof of Govt accel. Govt - CO timely decisions/involvement reqd. Govt - Poor performance checks/solicitation.
088	Home Entertainment	Army (AAFES)	Service	Ktr contends ASBCA lacks jurisdiction. Water damage to appellant's property & subsequent T4D.	Sustained	Govt - Failed to maintain premises, safeguard appellant's property & operate IAW existing K.
089	Voices R' Us	Navy	Reconsideration	Appellant move for reconsideration and clarification.	Denied	Ktr - No new or compelling evidence. Ktr needs to understand appeals process before submitting an appeal.
090	California Consulting Engineers	Army	Reconsideration	Ktr claims new evidence for reconsideration of Boards 4 Sept 98 ruling.	Denied	Ktr - No new evidence or legal theories.
091	C Lawrence Construction Co Inc.	Army	Reconsideration	Ktr claims Board erred in interpreting K drawings in 10 Sept 98 appeal.	Dismissed	Ktr - Untimely (>30 day deadline)
092	Vantage Associates, Inc.	Navy	Supply Accessory sets/spares	Ktr claims Navy used it's VECP years after K was closed out.	Dismissed	Ktr - Submitted VECP under closed K. Dismissed as premature until testimony is heard.
093	Holms & Narver, Inc.	FAA	Service Rental costs	Ktr claims right to include FY 95-02 indirect cost pools, rental costs for purpose of allocation to Govt K's.	Sustained	Govt - Untimely CO decision.
094	AM General Corp.	Army	Supply HMMWV accessory kits	Govt claims defective pricing under TINA as to whether appellant is entitled an offset in excess of Govt claim.	Denied	Ktr - Defective pricing in the purchase of parts, tooling, markups understate K price (Offset).
095	Home Entertainment	Navy	Supply	Ktr claims lost profits for being expelled from a Naval Station. Govt motion to strike case.	Denied	Govt motion to strike case denied. Govt - Arbitrary and Capricious in expelling Ktr.

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No.	Case Name	Branch of Service	Type of Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
096	Boeing Defense & Space Group	Air Force	Supply SRAMT & SRAM II	Ktr appeal of Govt T4C + final K cost for purposes of T4C close-out proposal.	Denied	Ktr - Must use target price and not ceiling price to determine K cost.
097	Metric Constructors, Inc.	C.O. Eng (Army)	Construction	Ktr requests monetary adjustment following T4C.	Denied	Ktr - Failed to submit a valid claim. No certification, inadequate settlement proposal.
098	Senor Tenedor, S.A. de C.V.	Dept of State	Eq. Access to Justice Act attny fee's/expenses	Legal fees/expenses incurred in successfully litigating under EAJA. Claim for \$44,728.	Sustained	Ktr - unable to substantiate one employee claim for \$39,995.7 due to lack of tangible evidence of work effort.
099	All Seasons Construction & Roofing, Inc.	Air Force	Construction Replace siding, windows pitched roof	Ktr claim for time & daily ovhd expenses relating to a 107 day Govt caused delay.	Sustained for 84days	Govt - Directed changes, delayed Ktr due to suspension of work. Differing site conditions due to rotted wood / replacement required.
100	Hughes Moving & Storage	Army	Service House Hold Good (HHG) shipments	Govt w/holding payments to Ktr for claims relating to 55 shipments of HHG's for military service members.	Split	Sustained - Where HHG damage was not Ktr fault Denied - Where HHG damage was Ktr fault.
101	TPI Intl, Airways, Inc.	Air Force	Service Air transportation	Ktr asks for reconsideration of 7 Jun 96 T4D decision. CO terminated K when FAA suspended TPI from flying.	Dismissed	Govt - Improper/lack of K monitoring. Ktr - Motion dismissed as untimely.
102	Intl. Maintenance Resources Inc.	Army	Service Mowing fire trails	Ktr alleges Govt changes in SOW. Some redundancy in SOW.	Denied	Ktr - Did not meet burden of proof. Govt - CO untimely responses, dual reqt's issued by Contracting and Purchasing branches. Ktr Poor judgment.
103	Taisei Rotec Corp.	Navy	Misc Request by Ktr to dismiss appeal	Request by Ktr to dismiss appeal.	Denied	(sparse data in this appeal decision)
104	Sauer Inc.	Navy	Construction Reconsideration	Ktr requests reconsideration to open the record to contest Ktr behind schedule issue.	Denied	Ktr - Unable to produce new/compelling evidence that the Ktr was actually on schedule.
105	Balimoy Manufacturing	Army	Supply 2M rounds 20mm ammo	Ktr failure to meet first article test / production schedule - urgent requirement.	Denied	Ktr - Lack of matts / tooling (Eddy Flow detector). Failure to meet schedule. Govt - Past performance checks/mkt research.
106	Aable Tank Services, Inc	Navy	Construction Removal of under ground storage tanks	Ktr claims Govt delay, obtaining digging permit + time lost preparing submittals - change in job scope.	Split	Denied - Submittals are part of K. Sustained - Digging permit not part of K. Govt - Should be better prepared for Ktr.

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No.	Case Name	Branch of Service	Type of Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
107	Industrial Steel, Inc.	NASA	Construction Environ. control bldgs at Kennedy Space Ctr.	Ktr claims Govt delays & disruption due to lack of access to launch pads A and B.	Sustained	Govt - Bad Govt planning / coordination caused delays and unabsorbed overhead using Eichleay formula (unable to shift to other work).
108	David Builders, Inc.	Navy	Construction Pavilion & landscaping	Ktr challenges remission of LD at \$200/ day for late completion of K. Alleges defective specifications.	Denied	Ktr - Unable / difficult to obtain reqd matts (roofing steel).
109	Applied Ordnance Technology Inc.	Natl Image & Mapping	Supply Various charting/mapping products	Govt w/holding progress payments + T4D and demand to repay all progress payments	Split	Govt - Untimely response by CO for matts approv. Ktr - Failure to meet schedules as reqd by K. Denied motion to stay offset.
110	City of Albuquerque	Air Force	Service Water & Sewage	Govt alleges defective pricing by the City of Albuquerque for water & sewer.	Sustained	Govt - Cost/pricing data not required under TINA therefore unable to prove.
111	Mid Eastern Industries	Navy	Supply	T4D assessing Ktr \$99,728 in procurement costs.	Dismissed	Ktr - Untimely appeal > 90 days. ASBCA lacks jurisdiction to hear appeals > 90 days after decision is rendered.
112	Sham's Engineering & Construction Co.	USAID Agency for Intl Devel.	Construction	Ktr claims settlement was unfair because a third party Ktr had received a larger settlement.	Denied	Ktr - Failed to provide sufficient data to warrant a higher settlement.
113	C Lawrence Construction, Inc.	C.O. Eng (Army)	Construction Aerial dlvy bldg.	Ktr alleges constructive changes to roofing system.	Denied	Ktr - Ignored own obligations. Gen Ktr is responsible for whole K. Should have inquired on missing dwgs. Product not to spec.
114	Pipeline Construction, Inc.	Army	Construction Repl. existing roof	Ktr appeal of T4D (work did not meet required specs).	Denied	Ktr - failed to make progress, poor workman-ship, failed to comply with K plans & specs.
115	Voices R' Us	Navy	Supply Computer test stand	Ktr requests reconsideration of 23 Mar 98 ASBCA decision.	Denied	Ktr - Failed to complete work on F404 test stand software. Not to specs. Failed to provide new evidence or legal theories.
116	JWA Emadel Enterprises	Air Force	Service Research services	Ktr - REA withholding payments on cost overruns in G&A and contract performance.	Denied	Ktr - Poor financial records keeping. Didn't heed CO cost overrun warnings.
117	California Consulting	Army	Service Research - welding proc.	Ktr alleges constructive changes to K. COR directed appellant to exceed scope.	Denied	Ktr - Failed to prove a change occurred. Govt - COR directed work present to be only

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No.	Case Name	Branch of Service	Type of Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
118	Orbital Sciences Corp.	Air Force	Supply Motor assy p/o SDI	Ktr requests reconsideration of 25 Sep 97 decision. Continued work on leap motors after T4C. (SDI project)	Denied Reconsider	recommendation's. Ktr - Poor judgment. Continued work after known termination order.
119	Heritage Reporting Corp.	Dept of Labor	Services Reporter for hearings	Ktr requests reconsideration of 13 Apr 98 decision. Cancelled hearings under four court reporting K's.	Denied	Ktr - Insufficient evidence. Previously rcvd \$24K of \$704K previously claimed.
120	Gardner Zemke Co.	Dept of Energy	Construction 2 bldgs	Motion to dismiss - lack of jurisdiction, transfer to DoE.	(Sustained) Motion to dismiss	Ktr - Claim not submitted to a Federal CO. Govt - Corps of Engineers started K, must go with Armed Services Board.
121	Propellex Corp.	Navy	Misc Request for clarification	Proceedings suspended pending completion of an on-going criminal investigation by the Grand Jury.	Not Specified	Ktr - Criminal investigation pending.
122	Leixab, S. A.	Army	Misc Untimely appeal	Sparce details in case writeup.	Dismissed	Ktr - Appeal untimely.
123	Graham International	Army	Service Maint. K for 8 facilities	Ktr claim REA for Govt delay of payment & deductions on nine invoices.	Dismissed	Ktr - Premature claim. Did not go through CO for a COFD therefore no claim submitted.
124	J&J Oilfield & Electrical Service	Army	Service Grounds maintenance	Ktr claims REA (addl costs imposed on Ktr + constructive changes).	Sustained	Govt - Erroneous interpretation of K.
125	International Maint. Resources, Inc.	Army	Service Mowing fire trails	Motion by Govt to dismiss on lack of board jurisdiction - bid protest unsettled.	(Denied) Motion to dismiss	Govt - Untimely, not responsive.
126	AEC Corporation	Navy	Construction Fire Loop - Rescue Trng Center	Ktr appeal of T4D - alleged lack of performance/missing schedule deadlines. Ktr requests T4C.	Sustained	Govt - Defective K documents / omission of work items, lack of monitoring to insure proper mails used. Bad mkt research / past perf. checks. -
127	JWA Enterprises	Air Force	Misc Reconsideration	Ktr appeal for reconsideration of 29 May 98 decision regarding cost overrun. Appeal was dismissed as untimely.	Denied	Ktr - Lack of new or compelling evidence.
128	All Star / SAB Pacific J.V.	Navy	Service Family housing maint.	Ktr claims K price increase to compensate for wage rate adjustments imposed by DoL.	Denied.	Ktr - Wage rate changes are Ktr responsibility, cost of doing business. Poorly estimated proposal.

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No.	Case Name	Branch of Service	Type of Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
129	Carolina Oil & Distributing Co.	Marine Corps	Procurement Gasoline + Diesel for 8 exchange service stations	Ktr - Claim for lost profits in selecting another follow-on Ktr for supply of petroleum + (verbal) K to build a gas station.	Split	Denied - Govt did not constructively terminate K. Dismissed - Govt not bound by verbal K to build gas station. Ktr failed to meet burden of proof.
130	Home Entertainment Intl, S.A.	Navy	Service Video concessionaire	Ktr claim for lost profits after being "kicked off the base" by base CO for criminal misconduct.	Denied	Ktr - Untimely claim. (after 10 years witness's could not be found)
131	Techplan Corporation	Navy	Eq. Access to Justice Act Att'ny fee's/expenses	Ktr claim for fee's and expenses incurred from expert witness + attorney.	Sustained \$104,221	Ktr - Must claim no more than the authorized wage rates for attorney's and expert witnesses.
132	Grumman Aerospace Corp.	Air Force	Supply Design concept	Govt request for reconsideration of 4 May 98 ruling for summary judgment.	Sustained (in favor of Ktr)	Govt motion denied by Board. Govt accepted design + Govt directed changes.
133	Rex Systems, Inc.	Navy	Supply 10ea circuit cards	T4C at convenience of the Govt. Govt motion to dismiss appeal; CO did not get a copy of the appeal.	(Denied) Govt motion to dismiss	Govt - CO must file answer (COFD) within 21 days. CO not familiar with K terms.
134	RMS Technology, Inc.	Army	Not specified	Govt motion to dismiss for failure to prosecute.	(Denied) Govt motion to dismiss	Ktr - Lack of timely response to evidence requests.
135	Sea Land Services, Inc. v. Military Sealift	Navy	Service Alleged overcharges X-port 5,192 loads	Overpayments alleged by Govt (higher tariff rates than other customers. Ktr seeks to recover offset proceeds withheld. Ktr claim of \$100K for T4D decision.	Sustained (Govt claim denied) Dismissed	Govt - Inaccurate cargo estimates. J&A called compare tariff rates to established tariff rates. Ktr - Must receive a COFD before appeal.
136	Vegas Analytical Laboratories	C.O. Eng (Army)	Service Operate water treatment plant / maintenance			Ktr - Failed to perform maintenance. Plant became inoperative.
137	Grumman Aerospace	Navy	Supply Wpns sys trainer for A-6E aircraft	Ktr appeal to alleged defective pricing. SubKtr refusal to submit cost/pricing data, due to being exempt.	Sustained	Govt - Definitized price exceeds ACO unilateral price so no overpayment.
138	Turbine Aviation	Air Force	Supply F-16 engine parts	Ktr appeal of T4D decision for allegedly failing to stay on schedule.	Sustained	Converted to T4C. Govt - Arbitrary and capricious. Slow in providing GFE, turbine dwgs (7 month delay).
139	Copy Data Systems	Dept of Intl Devel.	Misc Reconsideration	Ktr requested reconsideration of Board's 28 Apr 98 decision denying \$44K claim for outside SOW tasking.	Denied	Ktr - Lack of new or compelling evidence.

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No.	Case Name	Branch of Service	Type of Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
140	Rex Systems	Navy	Construction	Ktr requested reconsideration of Board's denial of unabsorbed overhead claim / lost profit due to Govt delays.	Sustained	Govt - Proven delays + provided defective Govt furnished specifications after reconsideration by the Board.
141	Boeing Defense & Space Group	Air Force	Supply	Ktr requested reconsideration of Board's 21 May 98 T4C decision.	Denied	Ktr - Govt may terminate if in it's best interest. (Christian Doctrine)
142	Graham Intl.	Army	Service	Govt motion to dismiss for lack of Board jurisdiction (untimely appeal) to convey a T4D decision to a T4C.	Dismissed	Ktr - Failure to complete work on schedule. Ktr - Untimely appeal (greater than 90 days).
143	Central Environmental, Inc.	Air Force	Service	Govt motion to dismiss for lack of Board jurisdiction (untimely appeal).	(Denied) Govt motion	Govt - Failed to recognize settlement proposal as a claim (untimely Govt decision).
144	SAL Industries Corp.	Air Force	Procurement	Govt motion to dismiss for lack of Board jurisdiction (untimely appeal).	Dismissed	Ktr - Untimely appeal (greater than 90 days).
145	MCI Telecommunications Corp.	Navy	Service	Ktr alleges arbitrary Govt interpretation of K language + fee for use of existing telephone equipment and cabling.	Sustained	Govt - Ambiguous K language. Govt not authorized to charge more than \$7.00/month/phone.
146	Mid-Eastern Industries, Inc.	Navy	Supply	Govt motion to dismiss for lack of Board jurisdiction (untimely appeal).	Dismissed	Ktr - Untimely appeal (greater than 90 days from COFD).
147	Ellis-Don Construction, Inc.	Health & Human Ser.	Construction	Ktr alleges Govt directed changes in K drwgs/specs. Differing site conditions, unanticipated soil/water condition. Addl \$ fm 107 day ext.	Denied	Ktr - Proven that Ktr was compensated for delay - addl \$11.7M.
148	Lanzen Fabricating, Inc.	Navy	Eq. Access to Justice Act	Ktr request for attorney fees + costs based on sustained decision.	Denied	Govt - Directed changes, untimely COFD. Ktr - Untimely application for EAJA (>30 days from date of Board decision).
149	West Electronics, Inc.	Navy	Supply	Ktr alleges Govt caused delay - changes to K-3 relay + unabsorbed overhead rates.	Denied	Ktr - K modification compensated Ktr. Ktr - Failure to submit a claim, poor records.
150	Nurse Works, Inc.	Navy	Service	Cancelled nurse shifts at NMCSO. Substitution w/ optional shifts.	Sustained	Govt - Critical path delays/Ktr concurrent delays. Govt - Directed changes w/o bilateral agreement. Offsets require agreement of both parties.

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No.	Case Name	Branch of Service	Type of Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
151	Emerald Maintenance, Inc.	Navy	Construction	Govt caused delays / changes for addl sandblasting and drywall patching.	Sustained for \$11,048.9	Govt - CO failure to issue a COFD + lack of K knowledge + lack of monitoring.
152	Kinetic Builders, Inc.	Air Force	Construction	Ktr alleges Govt caused constructive changes and addl work (exposed piping painting).	Denied	Ktr - Lack of proof/support entire \$325K claim. Ktr was already compensated by time extensions. Poor contractor judgment.
153	Kinetic Builders	Air Force	Construction	Ktr alleges defective Govt specifications w/ bathroom layout; claims time extension + overhead costs.	Denied	Ktr - Failed to prove monetary damage brought about by defective spec's.
154	Pizzagalli Construction Company	C.O. Eng (Army)	Construction	Ktr claims constructive changes - ambiguous drawings/specifications.	Denied	Ktr - Lack of proof it's interpretation was based on ambiguous set of reqts. Poor bid. Govt - K patently ambiguous.
155	Skyline Technical Construction Services	Navy	Construction	Ktr claims specification and constructive changes.	Denied	Ktr - Method of construction of responsibility of Ktr (poor judgment). No proof Ktr was required to perform addl work.
156	Oscar Narvaez Venegas	Dept of State	Construction	Ktr requests reconsideration based on new evidence / changing site condition.	Denied	Ktr - Request for reconsideration was untimely (>30 days from time of Board's decision). No new proof/evidence.
157	Electro Richter	Army	Service	Ktr appeal to Govt claim for refunds, rebate, and discounts (setoff procedures) in connection with a T/M emergency K.	Denied	Ktr - Govt clearly entitled to recover funds under setoff procedures (Ktr poor judgment).
158	Bay Gulf Trading Co. Ltd.	Marine Corps	Supply	Ktr alleges bad faith - used oil outside specification (>250ppm) and mislabeled.	Denied	Govt - Better K monitoring required. Ktr - No proof of breach of good faith. Board interprets oil as merely off- spec.
159	Carrol Automotive	Air Force	Supply	Ktr claims lost profit due to Air Force purchase of autoparts from third parties and not from K delivery order.	Sustained	Govt - Arbitrary and Capricious in not notifying appellant. Also honesty/integrity issues involved.
160	Fre'hoe Manufacturing Co., Inc.	DLA	Supply	Ktr appeals a T4D decision by CO.	Denied	Ktr - Failed to meet scheduled delivery dates. Ktr - Difficulty obtaining required materials.
161	H.E. Johnson Co., Inc.	Navy	Construction	Ktr alleges Govt actions (delays) caused appellant to discontinue work.	Sustained for \$2,775.50	Ktr - Continued to miss delivery dates. Ktr - Lack of proof. Only proved 1 day delay.

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No.	Case Name	Branch of Service	Type of Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
162	U.S. General, Inc.	Navy	Eq. Access to Justice Act Attny fee's/expenses	Attorney fees and expenses.	Dismissed	Ktr - Untimely claim (> 30 days).
163	MCI Telecommunications Corp.	Navy (NEXCOM)	Service Telecom services	Govt claims outstanding charges owed by appellant for use of existing cable lines.	(Denied) Summary Judgment	Govt/Ktr - Further development of the record needed in order to make a judgment.
164	R.C. Construction Co. Inc.	C.O. Eng (Army)	Construction Construct parachute packing facility	Ktr sponsoring SubKtr claim that K drawings not in accordance with industry standards.	Denied	Ktr - Failed to meet burden of proof.
165	Industrial Data Link, Corp.	Air Force	Reconsideration/clarify. of previous decision	Ktr requested reconsideration & clarification.	Denied	Govt - Failure to render timely COFD) Ktr motion untimely (> 90 days).
166	Reflectstone, Inc.	Air Force	Supply Aerial refueling simulator for pilot trng C-5/C-141	Ktr claims Govt changes, impossibility of performance, Govt superior knowledge.	Denied	Ktr - Cost overrun, unable to prove impossibility of performance.
167	Kentucky Building Maint. Inc.	Air Force	Service Cleaning aseptic service	Ktr claims CO mandated changes.	Denied	Ktr - Unable to prove K terms were ambiguous.
168	Kentucky Building Maint. Inc.	Air Force	Service Hospital Aseptic Mgmt	Ktr claims mandated changes/delays in rooms to be cleaned.	Denied	Ktr - Unable to prove K terms were ambiguous.
169	Voices R' Us	Navy	Service	Reconsideration of 16 Jul 97 appeal requesting T4C decision.	Denied	Ktr - Failed to provide new evidence or legal theories.
170	Schuepferling GmbH & Co.	Army	Service Painting of family quarters	Government denial of payment of invoices due to alleged bribery. Govt motion to dismiss.	Dismissed	Ktr - Admitted bribery of various Govt employees. Ktr poor judgment.
171	Labelle Industries, Inc.	Army	Eq. Access to Justice Act Attny fee's/expenses	K terminated for convenience. Ktr claims attorney fees and expenses.	Denied	Govt - Integrity problems. Ktr - Failed to make delivery of 43,347 rifle magazines. Product not w/in specs.
172	Triad Microsystems, Inc.	Navy	Service Modernize Navy's Amphib. arms evaluator	Motion by Govt to dismiss. Ktr not a legal entity due to filing Ch 7 bankruptcy.	Dismissed	Ktr - Company problems. Filed Ch 7.

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No.	Case Name	Branch of Type of Service Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
173	American Gulf Companies	Agency for Service Intl Devel. Grain shipments	Govt assessed LD for untimely performance. Govt motion for Summary Judgment.	(Denied) Summary Judgment Sustained	Ktr - Unable to meet/stay on schedule. K as a whole needed interpretation before judgment can be rendered.
174	D.E.W. Inc.	C.O. Eng Service (Army) Fuel delivery EAJA	Govt move for reconsideration & relief from award of attorney fees awarded under EAJA.		Govt - Failed to provide newly discovered proof/proof of fraud or misrepresentation.
175	Fairchild Industries, Inc.	Air Force Supply A-10 aircraft production	Ktr requests REA for phase out costs in closing down plant + environmental cleanup costs.	(Denied) Summary Judgment Dismissed	Govt - Withholding entitlements. Appeal deferred to full trial due to disputes over material facts.
176	Dee Schepppler	Air Force Service Expresso cart service	T4D due to failure to pay rental fees, late fees, and charges. Govt move to dismiss as untimely.		Ktr - Untimely appeal (> 90 days). Poor financial management.
177	D.E.W. Inc.	C.O. Eng Service (Army) Fuel delivery	Govt request to use withheld LD to pay termination costs.	(Denied) (Govt motion to reopen record)	Govt - Failed to provide new evidence.
178	JWA Emadel Enterprises, Inc.	Air Force Service Research - cleaning elox components	Govt delays; Ktr cost overruns.	Dismissed	Ktr - Untimely appeal / financial problems. Govt - Untimely COFD.
179	Saver Inc.	Navy Construction Interior completion of Trident Sub refit facil.	Ktr alleges Govt delays / disruption / changing site conditions.	Split	Sustained - Storage of large crane. Denied - Delay / disruption.
180	Boeing Defense & Space Group	Air Force Supply Design test of Sh. Range Attack Missile (SRAM)	T4C - Determination of termination settlement.	Sustained	Govt - TCO attempted to use termination formula other than that prescribed.
181	Dillingham / ABB-Susa	C.O. Eng (Army) Construction Main operating base upgrade	Ktr alleges Govt delays due to addl work added (air field lighting + paving).	(Denied) Govt motion to dismiss	Govt - Untimely COFD. Untimely CO action.
182	TRS Research	Army Service Eq. Access to Justice Act Attny fee's/expenses	Ktr seeks attorney fees and expenses.	Sustained	Govt - Untimely COFD, refusal to take timely action on Ktr claim, withholding payment on \$1.2M in invoices.
183	Alaska Mechanical, Inc.	Air Force Supply 4ea elec. boiler pump repl.	Ktr alleges changes due to CO interpretation of specification for replacement of wiring.	(Denied) Summary Judgment	Govt - Directed work changes outside SOW / ambiguous K language / defective specs.

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ASBCA CASES Jan 98/Jun 99

No.	Case Name	Branch of Service	Type of Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
184	La Belle Industries, Inc.	Army	Supply 1,198,000ea rifle magazines	Ktr requests costs + termination quantum on a partially terminated K.	Sustained	Govt - Overzealous inspections. Ktr - Failure to meet first article test / dlvy schedule. Awarded K based on COC from SBA.
185	Met-Pro Corp.	C.O. Eng (Army)	Construction Removal of fuel farm	Ktr claims costs of disposal of 10x the agreed amt of petroleum / differing site condition / cardinal change in SOW / addl in-scope work.	Sustained	Govt - Directed changes / untimely COFD.
186	Dan G. Trawick, III Contractors	Navy	Construction Renovation project of 680ea family units	Ktr alleges constructive changes.	Sustained	Govt - Specification changes / Govt directed changes. Ktr - Poor site survey.
187	Industrial Data Link Corp.	Air Force	Supply Radio Test Eq. Units	T4C - monetary claim.	(Denied) Summary Judgment	Govt - Not familiar w/ K terms. Ktr - Failed to submit termination proposal.
188	Structural Concepts, Inc.	Navy (NavFac)	Construction	Ktr requests reconsideration of 29 Dec 97 decision.	Denied	Ktr - Failed to provide sufficient evidence.
189	D.E.W. Inc.	C.O. Eng (Army)	Construction Eq. Access to Justice Act Attny fee's/expenses	T4C - Attorney fees and expenses.	Denied	Ktr - Workmanship not to spec (rusted, bent, missing fasteners, bowing trusses). CO w/drew Govt claim thus saving Ktr legal expenses. Govt - Directed changes.
190	Grumman Aerospace Corp.	Air Force	Supply F-111A/E Avionics Upgr. mission computer wiring	Ktr claims Govt changes, disruptions/delays/changes to specs.	(Denied) Summary Judgment	
191	Medi-Peth Medical Lab, Inc.	DLA	Supply Disposable test tubes	T4D - Untimely dlvy of disposable glass tubes.	(Denied) Summary Judgment	Ktr - Failed to deliver matl on schedule.
192	Martin Marietta Corp.	Air Force (NATO)	Supply Test equip. and tech. manuals for AN/FPS-117	Ktr requests REA for logistics support for the AN/FPS-117 radar.	Denied	Ktr - Poorly estimated proposal.
193	Martin Marietta Corp.	Air Force (NATO)	Misc Reconsideration	Reconsideration of 25 Feb 98 decision denying facilities capitol claim.	Denied	Ktr - Lack of new/compelling evidence.
194	W.G. Yates & Sons Construction, Inc.	Army	Construction Maint hangar for KC-135 tankers	Govt specification interpretation. Govt non-acceptance of primes first hangar door subcontractor.	Denied	Ktr - Conditional liability of a prime to it's Subktr does not fall under the Severin Doctrine.

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No.	Case Name	Branch of Service	Type of Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
195	Copy Data Systems, Inc.	Agency for Service	Intl Devel. Photo offset painting	Ktr requests costs for signature folding & gathering services.	Denied	Ktr - Misunderstood K. Not to specification.
196	Schuepferling, GmbH & Co. K G	Army	Construction Renovation / thermal insulation	Ktr alleges Govt w/holding payment of invoices, unfair practices. Govt motion to dismiss, void contract.	Dismissed	Ktr - Committed bribery / restrained trade. Govt - Agent accepted bribes, compromised competitive bidding process.
197	D.E.W. Inc.	C.O. Eng (Army)	Construction Aircraft Maint Facility	T4D - Ktr requests interest on withheld progress payments while awaiting LDs.	Split	Ktr - Work not to K specs. Govt - Untimely COFD.
198	Decker & Company	Army	Eq. Access to Justice Act Attny fee's/expenses	Attorney fees & expenses in successfully appealing a COFD.	Sustained	Govt - Lack of proof, unauthorized w/holding of entitlements. Ktr prevailed in 1 of 7 areas of appeal therefore auth. attorney fees at \$75/hr
199	Control Line	Army	Construction Prep/marketing of roads & airfield	Govt w/holding payments due to defective work.	Sustained	Govt - Unauthorized w/holding of funds fm Ktr due to defective work.
200	Asbestos Transportation Services, Inc.	Navy	Construction Reconsid. of previous decision	Reconsideration of ASBCA 46263 - increased landfill fees.	Denied	Ktr - No new or compelling evidence.
210	Zenith Data Systems	Air Force	Supply Windows 95 + Office 95 as a free upgrade to Govt	Ktr unable to secure items (Windows/ Office 95) from Subktr.	Denied	Ktr - Misunderstood the K in promising free upgrades to each software package.
202	SAI Industries Corp	Air Force	Supply 11 ea arm assy for A-37 and T-37 aircraft	T4D - Product failed to meet 8 of 22 dimensions (fit & form test)	Denied	Ktr - Failed to meet delivery schedule or product specifications.
203	SAI Industries Corp	Air Force	Supply 666ea bolt assy for TF-33 Engine	T4D appeal. Ktr unable to obtain mail specified in the K (5737 vise 5732 type steel). Untimely divy of first article.	Denied	Ktr - Unable to meet specifications.
204	Heritage Reporting Corp.	Dept of Labor	Service Court reporting services	Ktr alleges fees lost when Govt changed/ cancelled hearings under four court reporting contracts.	Sustained for \$24,744 claim. otherwise denied	Ktr - Lack of proof. Only allowed part of total
205	Systems & Electronics	Army	Service Install mobile repair shops in GFP M313Cvans	Ktr requests adjustment for delayed divy of GFP.	Sustained for \$642,420	Govt - Delay in delivery of GFP (M313 vans). Ktr could not obtain new work to absorb overhead during divy period.

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No.	Case Name	Branch of Service	Type of Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
206	Starhill Alternative Energy Corp.	Air Force	Construction Vehicle refueling station	Ktr appeal of T4D and liquidated progress payment of \$135,734.	Denied	Ktr - Failed to prove Govt was responsible for delay. Ktr financial problems.
207	Freedom, IV, Inc.	DLA	Supply Eq. Access to Justice Act Attny fee's/expenses	Attorney fees and expenses.	Sustained	Govt - No justification for Govt T4D decision.
208	Oscar Narvaez Venegas	Dept of State	Supply Lease for Consul General	Ktr requested costs for terminated lease w/o justification.	Sustained	Govt - Breach of lease K w/o justification + arbitrary w/holding of rent payments w/o incurring repair costs. Ktr - Failed to prove delay. Govt offered quick solutions and good turnaround of drwg technical questions.
209	Intercontinental Manufacturing Co.	Army	Supply Bombs - Mk82, BDU-50 BDU-45	Govt change interpretation in Govt drawing 923AS118.	Denied	Govt - 8 delayed divy's out of 110 moves (7%) is not high enough for T4D. Converted to T4C.
210	Hughes Moving and Storage	Army	Service HHG Moving Service K	T4D issued by CO based on customer complaints.	Sustained	Ktr - No new evidence. NNS books/financial records unaffected. NNS was never liquidated.
211	Newport News Shipbuilding and Dry-dock Co.	Navy	Not specified Amortization of goodwill	Reconsideration of 13 Mar 97 decision.	Denied	Ktr - Poor financial records keeping.
212	M A Mortenson, Co.	C.O. Eng. (Army)	Construction	Reconsideration of 16 Oct 96 decision.	Denied	
213	Scientific Management Associates, Inc.	Navy	Service Dlvy of services & mail	Ktr requests costs due to Govt attempting to cap overhead rates & fees.	Denied	Ktr - Failed to include a sum certain in the claim (used an estimate). Lack of solid proof.
214	Nagy Enterprises	C.O. Eng (Army)	Construction Water Treatment Facility	T4D appeal. COFD assessing LD for K delay of 425 days.	Denied	Ktr - Failed to make progress on K + repeated failure to deliver on promises. Poor Ktr judgment and lack of proof to overturn T4D.
215	Ried Associates, Inc.	Navy	Construction Eq. Access to Justice Act Attny fee's/expenses	Attorney fees and expenses p/o ADR settlement.	Dismissed	Ktr - Filed claim > 90 days following decision.
216	W.G. Yates & Sons Construction, Co.	Army	Construction Motion to quash subpoena	Motion to quash subpoena and a compelling deposition of claims preparer for Ktr.	(Denied)	Ktr - Claims preparer not covered under attorney-client privilege or work product privilege.

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No.	Case Name	Branch of Service	Type of Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
217	Jones Oil Co.	DLA	Supply	T4D appeal. Govt allegedly arbitrary and motivated by bad faith in defaulting K and making late progress payments.	Denied	Ktr - Failed to show CO acted in an arbitrary & capricious manner.
218	Northrop Worldwide Aircraft Services, Inc.	Army	Service	Ktr appeal for costs incurred in defending against Ktr decision to terminate 3 Govt employees for harassment & intimidation.	Sustained	Govt - Obligated to reimburse costs.
219	Copy Data Systems, Inc.	Agency for Intl Devel.	Eq. Access to Justice Act	Govt motion for reconsideration of decision that Govt is responsible for fees of expert witness when Govt deposes witness.	Dismissed	Govt - Motion untimely (>30days).
220	Schuepferling GmbH & C., KG	Army	Construction	Govt withholding of payments after learning of a bribery situation within the Govt organization.	Dismissed	Govt - Honesty/integrity (accepting bribes) Ktr - Poor judgment.
221	Voices R'Us	Navy	Supply	T4C - Delinquent Ktr claim for invoice payment and progress payments.	Denied	Ktr - Failure to make progress. Encountered various technical difficulties therefore progress payments not warranted.
222	Atherton, Construction	Air Force	Construction	Reconsideration of 19 Dec 97 decision.	Denied	Ktr - Lack of new or compelling evidence.
223	SAI Industries Corp	Air Force	Supply	T4D - Ktr failure to make divvy IAW K terms. Inability to secure materials.	Denied	Ktr - Inability to obtain materials/parts in economic quantities. Movement of plant delayed production and first article on time.
224	Stewart & Stevenson Services Inc.	Army	Supply	Reconsideration of previous decision.	Denied	Ktr - Did not meet burden of proof that cost overruns were the result of Govt unilateral change orders.
225	Winter Harbor Water Co.	Navy	Service	Govt requested REA following the turnover of a water company to the district. Govt claims unjust enrichment.	Sustained	Govt - Not familiar w/ K terms. No termination of service therefore not unjustly enriched.
226	E. R. Mitchell Construction, Inc.	Navy	Construction	Ktr requests costs due to unabsorbed ovhd from Govt caused delays.	Denied	Ktr - Failed to prove damages. Reassigned direct labor employees to other ongoing work during delay. No Eachley damages assessed.
227	Applied Technology Assoc. Inc.	Navy	Service	T4C - Denial of appellant claim for costs incurred as p/o termination settlement.	Sustained	Govt - Inadequate mkt research and past performance. CO out of loop. Let unofficial COR affect K and stop work order.

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No.	Case Name	Branch of Service	Type of Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
228	Home Entertainment, Inc.	Army	Service Video rental concessions	T4D - Ktr requests to be heard by Board.	(Denied) (Govt motion to dismiss)	Govt - Lack of timely action, timely COFD.
229	Industrial Data Link Corp.	Air Force	Supply Radio sys's w/ power supplies	T4C - Ktr claim for termination settlement.	Denied	Ktr - Failed to provide termination proposal w/in 1 year (29 months) therefore lost right to appeal.
230	Lavelle Co.	Air Force	Supply Aircraft parts	T4D - Govt terminated K for non-delivery.	Denied	Ktr - Failed to prove delivery date was excusable. Failed to deliver first article. Govt - Delay in delivery of Mod 1.
231	Intercontinental Mfr. Co.	Army	Supply Bomb bodies MK 82, BDU50, BDU45	Govt delays / changes. Required zinc phosphate coating of bomb bodies at certain weights.	(Denied) Summary Judgment	Govt - Imposed higher standards. Directed constructive changes.
232	Agro-Lawn Systems, Inc.	C.O. Eng (Army)	Service Grounds maint. Arlington Nat'l cemetery	Ktr requests costs due to Govt changes to specs and poorly written solicitation.	Split	Ktr - Poorly estimated proposal. Govt - Unreasonable constructive changes.
233	Grumman Aerospace Corp.	Air Force	Supply EF-111A aircraft upgrade ground signal wiring	Delay/disruption by Govt.	(Denied) Summary Judgment	Ktr - K interpretation, case premature. Govt - Govt changes, case not developed enough for a hearing.
234	Grumman Aerospace Corp.	Air Force	Supply EF-111A aircraft upgrade modernize avionics	Delay/disruption by Govt.	(Denied) Summary Judgment	Govt - Constructive changes, increased functional redundancy requirements.
235	Martin Marietta Corp.	Air Force	Supply OTH Hardware	Defective pricing allegation.	Split	Denied - Unallowable facilities capitol charge Sustain - balance of appeal. Ktr - Poorly estimated proposal.
236	An Jac Corp.	Navy	Construction Install 2ea shower stalls	T4D - Ktr failure to complete work by reqd date due to numerous discrepancies.	Denied	Ktr - Failure to stay on schedule/pers probs. Govt - Lack of timely action/past performance checks not conducted.
237	Richard Lobarto Remodeling Inc.	Army	Construction Repair & maint.	T4D - Violations of labor standards, non-payment of labor.	(Denied) Summary Judgment	Ktr - Failure to address cure notice regarding financial and labor costs.
238	Alsace Industries, Inc.	DLA	Supply 45ea support structures	Cancellation of D.O. for failure to meet divy date. Govt caused delay.	Sustained	Govt - Lack of timely COFD/lack of timely answers to Ktr's questions.

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ASBCA CASES Jan 98/Jun 99

No.	Case Name	Branch of Service	Type of Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
239	United technologies Corp/ Pratt & Whitney	Air Force	Supply F100 aircraft engines	Defective pricing offsets - \$7.1M against Govt's claim of \$10.7M.	Denied	Ktr - Poor Ktr judgment. Failed to disclose sweep data before certification date.
240	Grumman Aerospace Corp.	Air Force	Supply EF-111A aircraft upgrade	Govt actions/inactions and changes allegedly caused performance disruptions and delays.	(Denied) Summary	Govt - Defective GFP (Stores mgmt sys.) Govt - Defective/misleading specifications.
241	L&M Thomas Concrete C., Inc	Air Force	auto bomb centering sys Construction Repair ramp & taxiway	T4D - Unearned LDs.	Judgment (Denied) (Govt motion to dismiss)	Govt - Constructive changes from Govt actions. Govt - Work outside scope of K.
242	Alvarez & Associates, Co.	C.O. Eng (Army)	Construction	Liquidated Damages (LD) appeal.	Denied	Govt - Wrongful withholding of payments. Ktr - Lack of evidence.
243	Arapaho Communications, Inc	Air Force	Construction Eq. Access to Justice Act Attny fee's/expenses	Attorney fees and expenses.	Sustained	Govt - Extended K divy date. Unfamiliar with contract. Lessor amount received due to claiming inflated expenses w/o proof.
244	Intl Fidelity Insurance Co.	Navy	Construction	Ktr requests a reduction in LD assessment of alleged 878 day delay.	Sustained	Govt - Not familiar therefore assessed higher rate of LD than was legal.
245	C.E.F.P. s.n.c.	Navy	Construction Install roof on existing structure	Ktr requests a reduction in LD assessment required by CO.	Denied	Ktr - K not performed IAW spec and good building practice.
246	AAR Allen Group, Inc.	NASA	Service Maint. on 747 shuttle aircraft - engines	Defective pricing. Ktr failure to disclose cost or pricing data on parts inventory.	(Denied) Summary	Govt - Expanded scope of work. Ktr - Poor Ktr judgment.
247	McDonnell-Douglas Helicopter	Army	Supply Spares for helo's	Defective pricing. Ktr failure to comply with CAS 414 (FCCM) in the inclusion of 137 acres of land as p/o capitol expense.	Judgment (Denied) Summary	Ktr - Poor Ktr judgment and poorly written proposal. Land not needed or used in normal operations - does not meet FCCM criteria.
248	Commercial Energies, Inc.	Navy	Service Supply natural gas	Ktr requests REA for lost profits. Daily cap imposed by CO prevented Ktr from transporting gas. Purch. fm addl ktr.	Judgment Sustained	Govt - Govt directed changes, breach of K by purchasing from a standby ktr.
249	Grumman Aerospace Corp.	Air Force	Supply EF-111A aircraft upgrade	Ktr alleges Govt disruption of performance, delays, constructive changes by issuing contradictory directions.	(Denied) Summary Judgment	Govt - Directed changes by asking Ktr to remove low altitude warning then reinstall same system.

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No.	Case Name	Branch of Service	Type of Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
250	H K H Capitol Hotel Corp.	Air Force	Service Lodging for MEP's Enlistee's	Ktr claims for Govt allegedly providing high lodging, meals, transportation estimate for MEP Enlistee's	Denied	Govt - MEP Enlistee numbers lower due to imposed DoD drawdown. Poor mkt research of estimated MEP numbers.
251	Ellis Construction C., Inc.	Air Force	Construction Addl work performed	Ktr claim for Govt delays.	Dismissed	Ktr - Not responsive to discovery/Govt inquiries - abandoned prosecution. Govt - Directed changes.
252	Dante Calbagni	Def Reutil & Mktg Service	Supply 4ea truck mounted cranes	T4D - Govt demand for LD + nonpayment penalty.	Dismissed	Ktr - Poor Ktr judgment. Govt - Not a valid K. Did not get a signature.
253	Fareast Service Company	Marine Corps	Supply Motion to reconsider	T4D - Ktr failed to provide the product.	Denied	Ktr - No new or compelling evidence or legal theories.
254	Valenzuela Engineering, Inc.	NASA	Construction Repairs to Bldg 4823	CO inflexibility in demanding a special proprietary heating system.	Sustained	Govt - Constructive change, unfamiliar with K terms. Insisted on the named system vise equal or greater quality system.
255	Teximara Corp.	Air Force	Service Fueling/gnd. equip. maint.	Ktr requests REA due to increased labor costs.	(Denied) Summary Judgment	Ktr - Poorly prepared proposal.
256	Asbestos Transportation Services, Inc.	Navy	Service Refuse collection & disposal	Ktr claim for increased landfill fees and changes to K.	Denied	Ktr - Responsible for landfill under the K. Closing of the BFI landfill did not cause a cardinal change to the K.
257	Boro Developers, Inc.	Navy	Construction	Differing site conditions. Request for reconsideration.	Denied	Ktr - No new evidence or legal theories.
258	McDonnell-Douglas Corp.	Army	Supply Reconsideration	Reconsideration of 3 Sep 97 decision.	Denied	Ktr - No new evidence or legal theories.
259	Con-Seal, Inc.	Navy	Construction Repair taxiway	Ktr requests adj. for the removal of surface matl, laitance removal, joint sealant cracking, chipping concrete off of joint, delays.	Split	Govt - Interference caused addl. work. Ktr - Lack of proof of lost time, surface or laitance removal.
260	Peter Gross GmbH & Co. KG	Air Force	Service Repair of water tank	Ktr claim for differing site conditions.	(Denied) Govt motion to dismiss	Ktr - Failed to meet specification's.

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No.	Case Name	Branch of Type of Service	Reason(s) for Dispute / Claim	Board Decision	Weaknesses Identified
261	Tri-Star Defense, Inc.	Army Supply 156ea tank transmissions	T4D - Failure to deliver final 8 units.	Denied	Ktr - Failed to divr. on schedule, lack of proof of allegation, poorly estimated proposal, personnel and company problems.
262	Asbestos Free, Inc.	Air Force Service Asbestos removal	Ktr requests interest on performance bond.	Denied	Ktr - Interest penalty not payable under the prompt payment act.

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APPENDIX H. DATA COLLECTION FORM

Case Name:

Case Number:

Case Date:

Court: ASBCA / U.S. Court of Federal Claims /

Search Terminology:

Department of: _____

Awarding Agency:

Location of Performance:

Contract Number:

Method of Award:

Type of Procurement / Service / Construction:

Dollar Value of Contract:

Dollar Value of Claim / Dispute:

Timeline: +-----+-----+

K Awd COFD Decision

Reason(s) for Dispute / Claim:

Court's Decision:

Weaknesses Identified:

Potential Preventers from Problem Occurring:

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